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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 800.

BEN W. FORTSON as Secretary of State of the State of Georgia, and His Successor in Such Office, as Such,
Appellant,

v.

JOHN MORRIS, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

JURISDICTIONAL STATEMENT AND APPELLANT'S BRIEF ON THE MERITS.

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JURISDICTIONAL STATEMENT.

On November 17, 1966, the United States District Court for the Northern District of Georgia entered an order declaring unconstitutional and void that portion of the Constitution of Georgia of 1945 which authorizes the election of the Governor of Georgia by the General Assembly where no candidate has received a majority of the votes cast in the General Election for this office, Ga. Const., Art. V, Sec. I, Par. IV (Ga. Code Ann. § 2-3004).

In its order, the District Court enjoined the Secretary of State (Appellant) from seeking to cause the election of a governor by the General Assembly.

This is an appeal from that order and judgment. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW.

The November 17, 1966, opinion and order of the District Court, which are not yet reported, are reproduced as Appendix "A" (pp. 27-33) hereto. See also Tr. 226, 233.

JURISDICTION.

The District Court's order of November 17, 1966, was entered in two suits.

The first action, John Morris *et al.* v. Ben W. Fortson, Civil No. 10533, was filed on November 9, 1966. It alleged jurisdiction as follows:

> This action arises under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States, and Title 42, §§ 1981 and 1983 of the United States Code. Jurisdiction is conferred on this Court by §§ 1331, 1343 (3) (4), 2201, 2281, and 2283 of Title 28, United States Code and §§ 1981, 1983, and 1988 of Title 42, United States Code. (Tr. 90, Complaint, *Id.* at par. I.)

The plaintiffs in the first suit prayed, *inter alia,* for a three-judge court and for an injunction preventing the General Assembly from electing a governor pursuant to the Georgia Constitution until such time as representation in the General Assembly shall be based solely on population (which has been ordered to occur by 1969). For the history of Georgia General Assembly reapportionment litigation, see *Toombs v. Fortson,* 205 F. Supp. 248 (N. D. Ga. 1962); *Fortson v. Toombs,* 379 U. S. 621 (1965);

Toombs v. Fortson, 384 U. S. 210 (1966), *affirming* 241 F. Supp. 65 (N. D. Ga. 1965). On November 9, 1966, a three-judge court was designated (Tr. 102).

The second action, Larry G. Justice *et al.* v. Ben W. Fortson, Jr., Civil No. 10546, was filed on November 10, 1966. It alleged jurisdiction in part as follows:

> This action is brought to redress deprivation of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States . . . This cause of action is authorized to be brought by 42 USC, Section 1983. Jurisdiction upon this Court is conferred by 28 USC, Sections 1343 (3) (4), 1331, 2201, 2281 and 2283, and 42 USC, Section 1988 . . . This action is required to be heard and determined by a court of three judges persuant to 28 USC, Section 2281 et seq. (Tr. 106, Complaint, *Id.* at par. II.)

The plaintiffs in the second suit prayed, *inter alia*, for a declaration that said Art. V, Sec. I, Par. IV, of the Georgia Constitution was unconstitutional, for an injunction against its enforcement, and for a runoff election between Howard H. Callaway and Lester Maddox. On November 10, 1966, the three judges who had been designated in the first suit were designated as the judges in the second suit (Tr. 119). Both suits were heard on November 11 (Tr. 1-89).

In its November 17 opinion, the court below said (Appendix "A", p. 27):

> A three-judge district court was convened in each case under 28 U. S. C. A., § 2281, et seq. Jurisdiction is conferred by 28 U. S. C. A., §§ 1343 (3), 1331, 2201, and 42 U. S. C. A., § 1988.

The District Court's order and injunction, from which this appeal is taken, were entered and filed on November 17, 1966 (Tr. 233).

Appellant's notice of appeal to this Court was filed in the District Court on November 18, 1966 (Tr. 235).

The jurisdiction of the Supreme Court to hear this appeal is conferred by 28 U. S. C., §§ 1253, 2101 (b), and 2201 (as amended). Decisions sustaining the Court's jurisdiction to review orders and injunctions issued by three-judge District Courts on direct appeal include *Reynolds v. Sims*, 377 U. S. 533 (1964) and *Fortson v. Toombs*, 379 U. S. 621 (1965).

GEORGIA CONSTITUTIONAL PROVISION INVOLVED.

The District Court declared unconstitutional and void that portion of the Georgia Constitution which appears in italics below:

> The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; *but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.* Art. V, Sec. I, Par. IV (Ga. Code Ann., § 2-3004) (Italics added).

The court below stated that the question presented to it was whether the election system; i. e., by the General Assembly, was proscribed by the rationale of this Court's

decision in *Gray v. Sanders,* 372 U. S. 368 (1963) (see Appendix "A", p. 29). The District Court's *per curiam* opinion was not based upon alleged malapportionment (Appendix "A", pp. 27-28). During the hearing on November 11, 1966, the court said that it then was of the tentative view that the General Assembly could not constitutionally elect a governor even if it were perfectly apportioned (Tr. 1, Transcript of November 11, 1966, hearing, 78-79).

Other provisions of the Georgia Constitution and of the laws of Georgia which are directly involved in this litigation are set forth in Appendix "B" (pp. 34-38).

QUESTIONS PRESENTED.

1. Did the District Court err in declaring unconstitutional and void that part of the Georgia Constitution providing that the General Assembly of Georgia would elect a governor when no candidate for that office in the General Election received a majority of the votes cast?

2. Even if the question stated above were to be answered in the negative, by declaring unconstitutional said provision of the Georgia Constitution and by enjoining the Secretary of State of the State of Georgia from seeking to cause the election of a governor by the General Assembly, did the court below abuse its discretion and err in (i) overlooking "the mechanics and complexities of the state election laws" (*Reynolds v. Sims,* 377 U. S. 533, 585) (1964), and by (ii) disrupting the election process by "requiring precipitate changes" that make unreasonable demands on the State and its citizens (*Ibid.*)?

3. As subsidiary questions to both the first and second questions stated above, did the court below err in extending the rationale of *Gray v. Sanders* to the point of leav-

ing Georgia without a newly elected governor and without procedures for electing one?

(a) Where a valid provision of a State Constitution requires that a governor be elected by majority vote, and no candidate in the General Election receives such majority by reason of the casting of a relatively small bloc of write-in votes, does *Gray v. Sanders* permit, in a runoff election between the two candidates receiving the highest number of votes, the exclusion and discounting of write-in votes so that a majority may be obtained, or does *Gray v. Sanders* require the equal counting of such write-in votes in the runoff election, with the possible result that no candidate will receive the required majority for election as governor?

(b) If *Gray v. Sanders* requires the counting of write-in votes in such runoff election, does not *Gray v. Sanders* permit the disruption of the election process by a small group of voters, and allow them to keep the incumbent in office, pending a special or general election open to a candidate or candidates acceptable to them, where another runoff may be required with the casting of write-in votes again preventing any candidate from receiving the required majority?

(c) Does *Gray v. Sanders,* when so extended and interpreted, in effect force a state to abandon a valid and desirable requirement that its governor be elected by majority vote, and to adopt the plurality system of election, thereby losing the assurance that the governor be elected by, and be responsible to, the majority of the people; or does *Gray v. Sanders* in its basic concept require that no candidate be elected by less than a majority, thereby invalidating the plurality system of election?

STATEMENT OF THE CASE.

On September 14, 1966, the Democratic Party of Georgia conducted a primary for the nomination of candidates to numerous State and County offices, including the office of governor. The candidates for nomination to that office received votes as follows (Tr. 139, 178, Request No. 6):

Ellis G. Arnall	231,480
Lester G. Maddox	185,672
Jimmy Carter	164,562
James Gray	152,973
Garland T. Byrd	39,994
Hoke O'Kelly	13,271
Total	787,952

Because no gubernatorial candidate received a majority, the Democratic Party conducted, on September 28, 1966, a runoff primary between the two candidates who had received the highest number of votes. The result of the runoff was as follows (Tr. 139, 178, Request No. 7):

Lester G. Maddox	443,055
Ellis G. Arnall	373,004
Totals	816,059

Lester G. Maddox became the nominee of the Democratic Party for the office of governor.

Howard H. Callaway was the nominee of the Republican Party of Georgia for that office (Tr. 139, 178, Request No. 8).

Prior to the General Election, interest developed in "writing-in." On October 21, 1966, the Attorney General pointed out to the Secretary of State that the provision

of the Georgia Election Code relating to a runoff election would not apply in the governor's race (Tr. 139, 178, Request No. 9, Pl. Ex. A).

The General Election was held on Tuesday, November 8, 1966.

On Wednesday, November 9, 1966, the first of these two suits was filed in the District Court (Tr. 90). The plaintiffs in that suit (John Morris, *et al.* v. Ben W. Fortson, *supra*) sought, *inter alia*, to enjoin the election of a governor by the General Assembly until it is reapportioned—in or before 1969. See *Toombs v. Fortson*, 241 F. Supp. 65 (N. D. Ga. 1965); *Toombs v. Fortson*, 384 U. S. 210 (1966).

On Thursday, November 10, 1966, the second suit was filed (Tr. 106). The plaintiffs in that suit (Larry G. Justice, *et al.* v. Ben W. Fortson, Jr., *supra*) sought to enjoin the election of a governor by the General Assembly and to require the holding of a runoff election between Howard H. Callaway and Lester G. Maddox.

On Friday, November 11, 1966, the three-judge court heard argument in both cases.[1]

Appellant's responsive pleadings (Motions to Dismiss and Answers in both suits) were filed on Monday, November 14 (Tr. 120-134).

As of 1 p. m. on November 11, 1966, the unofficial returns compiled by the News Election Service, composed of Associated Press and United Press International and three radio and television networks (ABC, CBS and NBC) showed the results of the November 8 gubernatorial race as follows:

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[1] By letter dated and filed November 15, 1966, the Attorney General advised the District Court that he did not insist upon compliance with the five-day requirement of 28 U. S. C., § 2284 (2) (1960) (Tr. 183).

Howard H. Callaway; Republican	449,894
Lester G. Maddox; Democrat	448,044
Ellis G. Arnall; Write-in	57,832
Total	955,770

No one had a majority. (The foregoing information appears from Plaintiffs' Requests for Admissions, Tr. 139, pars. 4 and 11, served and answered, Tr. 178, on November 15, 1966.)

Under the Georgia Constitution (Art. V, Sec. I, Par. III, Ga. Code Ann. § 2-3003) and the Georgia Election Code, § 34-1506 (c) (Appendix "B", pp. 35, 37), the official returns of the governor's election are sealed by the ordinary of each county, directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who "without opening said returns" causes them to be laid before the Senate on the day after the two houses organize. In 1967, the two houses will convene on January 9.

The General Assembly, in joint session, opens and publishes the returns of the election for governor and determines all questions relating thereto. Ga. Laws 1949, p. 948; Georgia Code Ann. § 40-104.1 (Appendix "B", p. 36). Thus, the official returns have not been opened and their tabulation has not yet taken place.

Without in any way undertaking to infringe upon the prerogatives of the General Assembly, in view of the decision of the court below Appellant's counsel hereby stipulate, for the purpose of expediting the disposition of this appeal in the interest of the citizens of this State, that this Court may asssume that when the General Assembly opens the official election returns no one will have received a majority of the votes cast for the office of governor.

On Tuesday, November 15, the plaintiffs in the first suit (John Morris, *et al.* v. Ben W. Fortson, *supra*) filed a second motion for injunction (Tr. 184). In that motion, plaintiffs prayed not for a runoff but for a special election; i. e., an election open to any candidate.

On Thursday, November 17, the District Court entered its opinion and the order from which this appeal is taken, declaring unconstitutional and void that part of Art. V, Sec. I, Par. IV of the Georgia Constitutional which authorizes the election of a governor by the General Assembly where no candidate has received a majority of the votes cast, and enjoining Appellant from seeking to cause such an election by the members of the General Assembly. See Appendix "A" (pp. 32-33).

THE QUESTIONS ARE SUBSTANTIAL.

The 1966 General Elections are over in 49 States. In those States, the names of the winners are known. They have thanked their supporters and are making plans to fulfill the duties of their offices. The bitterness of political charge and countercharge is almost forgotten.

In Georgia, the election of the State's chief executive officer is not over. The name of the winner is not known. The campaigning and the political charges continue.

There is, however, no breakdown in government. Georgia has a Governor elected in 1962 who "shall hold his office . . . until his successor shall be chosen and qualified." (Art. V, Sec. I, Par. I., Constitution of Georgia, Ga. Code Ann., § 2-3001; Appendix "B", p. 34).

Prior to 1824, the General Assembly of Georgia elected the governor in the first instance. In 1824 an amendment to the Georgia Constitution of 1798 was adopted whereby the governor was elected by the people, except that when

no person received a majority, the General Assembly was to elect the governor (Dawson, Compilation of Georgia Laws, p. 116 [1831]; Cobb, Digest, p. 1118 [1851]; Ga. Laws 1823, Act No. 270).

Once, in 1947, the governor-elect, who had received a majority, died before taking office. After a motion declaring that the legislature had no authority to elect a governor failed to carry by a vote of 118 to 132[2], the General Assembly undertook to elect the governor. That was the only time since 1824 the legislature ever undertook to elect the governor. The Georgia Supreme Court held such election by the General Assembly to be invalid under the particular circumstances of that case. *Thompson v. Talmadge,* 201 Ga. 867, 41 S. E. 2d 883 (1947).

Today the name of Georgia's next governor again is not known. This time there is no dispute over possession of the governor's office, but the District Court has, in politically motivated suits, declared unconstitutional that provision of the Georgia Constitution which has been a part of Georgia's Constitutions of 1861, 1865, 1868, 1877 and 1945[3], without criticism until the heat of politics was felt.

Because the official returns, under valid provisions of the Georgia Constitution and law (Art. V, Sec. I, Par. III, Ga. Code, § 34-1506; Appendix "B", pp. 35, 37), are to remain sealed until tabulated by the General Assembly (Ga. Laws 1949, 948; Ga. Code Ann. § 40-104.1; Appendix "B", p. 36), there is no way to elect a governor in Georgia this year, except by judicial decree.

By eliminating that provision of Georgia constitutional law which would have avoided the doubt created by

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2 Ga. H. R. Jour., J. S. Res. 3, 36-28 (1947).

3 Ga. Const. Art. III, Sec. I, Par. II (1861); Ga. Const. Art. III, Sec. I, Par. II (1865); Ga. Const. Art. IV, Sec. I, Par. II (1868); Ga. Const. Art. V, Sec. I, Par. V (1877); and Ga. Const. Art. V, Sec. I, Par. IV.

these two suits, the decision of the District Court has left the people in a quandry. Must the election of a governor await reapportionment? Will there be a runoff between Callaway and Maddox, and, if so, will write-in votes be counted? Will there be a special election open to all candidates?

The questions presented by this appeal are substantial.

The District Court stated that the question presented is whether this election system: i. e., election by the General Assembly from the two candidates receiving the highest number of votes, where no one received a majority, is proscribed by the "rationale" of this Court's decision in *Gray v. Sanders* (Appendix "A", p. 29). In *Gray*, the county-unit system of nomination in the Democratic Party primary was invalidated on the "one person-one vote" principle. This Court enumerated many of the things it was not dealing with in *Gray* (372 U. S. at 376, 378, 381-382). The Court did not expressly include or exclude in *Gray* the questions at bar.

We respectfully submit that the District Court erred in its understanding of the rationale of *Gray v. Sanders*. We respectfully submit that *Gray* does not require that all State officers be elected by popular vote. In Georgia the State Auditor is elected by the General Assembly (Ga. Laws 1943, 361-363; Ga. Laws 1945, 115-117; Ga. Code Ann., § 40-1801). In several States the Attorneys General, Secretaries of State and State Auditors are appointed by the Governor or elected by the Legislature.[4] In other States these officers are elected by popular vote. Some State judges are elected. Others are appointed in the first instance. *Gray v. Sanders* itself does not invalidate

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[4] See Appendix "C". Would the English system of having the Prime Minister elected by the representatives to Parliament be unconstitutional if adopted by a State?

the election of State officers by State Legislatures or require that they be elected by popular vote.

In *Gray v. Sanders*, 372 U. S. at 381, the Court said that ". . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." The voters of Georgia wisely, years before the problem arose during the heat of a political election, chose to terminate, as of the November General Election, the class of voters entitled to vote for the office of governor. They chose also to terminate their qualification to vote under the limited circumstances alleged to exist here, and at the same time to limit the choice of the General Assembly to the two men selected by the voters. There is no inequality of voting, no discrimination between voters, no inequality in the right to vote, and no lack of equal protection of the laws, where the voters choose to let their elected representatives select a governor.

Gray v. Sanders was based upon the Equal Protection Clause (Id. at 379). There is, we submit, no unequal protection in Art. V, Sec. I, Par. IV of Georgia's Constitution. It applies equally to all.

Article V, Section I, Paragraph IV of the Constitution of Georgia was renewed and approved by a popular vote (one person-one vote) in 1945.

The elected officials of Georgia, including the Secretary of State and the Attorney General, are obligated to uphold the Constitution of Georgia and they are representing the interests of the people of this State who voted for the Constitution.

Constitutions are written, and followed, to avoid chaos and anarchy. They contain provisions to fill vacancies in leadership when the persons elected by the voters die

or resign. Georgia's Constitution, like other constitutions, provides that upon the death, resignation or disability of both the Governor and the Lieutenant Governor, the Speaker of the House of Representatives shall exercise the executive power (Ga. Const., Art. V, Sec. I, Par. VII). The Speaker is elected by the House (Ga. Const., Art. III, Sec. VI, Par. II, Ga. Code Ann., § 2-1802; Ga. Code, § 47-106). Could it be said that because he was not elected by popular vote, the Speaker could not exercise the executive power, upon the death of the Governor and Lieutenant Governor, until a new Governor could be elected? The people by their State Constitution have indicated that the orderly continuation of executive leadership is more significant than the unlimited right to vote in selecting that leadership.

By the same token, when the people have been unable to agree as to whom to elect to office in the first instance, Constitutions contain provisions for filling vacancies in leadership. Every two years we hear of instances where two candidates "tie" in their race for a particular office. Would anyone say that, in cases of "tie votes", it was unconstitutional for the people, by prior decision, to have provided that their incumbent representatives could fill the vacancy created by the inability of the voters to choose one particular candidate over the other?

Georgia's constitutional provision authorizing the General Assembly to select a governor, when no candidate has received a majority, is simply the means adopted by the citizens to provide leadership, after that leadership has not been chosen and supplied by the voters.[5] Georgia's

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[5] Vermont and Mississippi also require a majority vote for the election of the Governor. The Vermont (Vt. Const. ch. 2, § 39) and Mississippi (Miss. Const. art. V, §§ 140 and 141) Constitutions contain provisions similar to Georgia's whereby the Legislature or one house elects the Governor from the top two

constitutional provision is only one step removed from a "tie-breaking" provision.[6] As heretofore noted, the people could, constitutionally, decide that their governor, or his temporary replacement, should be elected by the legislature under certain circumstances. Can not the people also decide that if they do not give one candidate a majority, then the legislature should select the governor from the top two candidates? The people of Georgia did that when they adopted the Constitution of 1945. They reached agreement in advance, knowing that once the problem arose and the names of the candidates were known, they would be unable to agree at that time. They said in effect, we must have a governor, even if we can not agree on whom he should be, and when we do not agree, the legislature should nevertheless provide us with a governor, from the two men we chose in the first instance.

When the people of Georgia in 1824 approved the amendment whereby they thereafter elected the governor, they decided that they would do so when they gave one candidate a majority, but they said, in effect, if the candidates are so equally matched that we give no one a majority, then we want our elected representatives, who know the candidates, their qualifications and the requirements of the office, to elect a governor, from the two we chose in the first instance.

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or three candidates. See Appendix "D", sec. I, p. 41. Two other states, Rhode Island (R. I. Const. amend. 11, § 3) and Maine (Me. Const. art. 5, § 3) may have similar provisions. It is not clear to us whether Rhode Island and Maine require a majority or plurality for the election of the Governor, but it is clear that the Legislatures would elect the Governor when the people fail to do so. See Appendix "D", sec. II, p. 42.

[6] Thirty-six States provide that the State Legislature shall elect the governor in the event of a tie; i.e., in the event the people do not elect a governor. See Appendix "D", sec. III, p. 42. Thus, at least forty-one States have provisions whereby the legislature elects the governor where the people have failed to do so. Appendix "D", secs. 1-3, pp. 41-44.

The U. S. Constitution contains a similar provision regarding the election of the President. In its opinion (Appendix "A", p. 29), the District Court cited *Gray v. Sanders, supra,* to the effect that "a state may not avoid equality in the vote by following the federal electoral system." The court below missed the point, we respectfully submit. This Court in *Gray* held that the fact of numerical inequality in the electoral college was not grounds for permitting the numerical inequality of the county-unit system, but the Court did not hold that the procedure in the U. S. Constitution whereby, upon failure of the electoral college to elect the President, the House of Representatives would choose him, was an unconstitutional method of providing leadership where the voters had not. *Id.* at 378. Early this term the Court in *Delaware v. New York et al.,* No. 28 Original, 35 U. S. L. Week 3138 (U. S. Oct. 17, 1966), declined to hear Delaware's complaint that state requirements of unit voting by presidential electors; i. e., state requirements that all presidential electors vote for the presidential candidate receiving the majority of the votes, was a denial of equal protection.

In *Gray v. Sanders,* this Court noted that it was "only a voting case" (*supra* at 378). In *Reynolds v. Sims, supra* at 560, involving the reapportionment of both houses of a state legislature, the Court pointed out that *Gray* was not dispositive of or directly controlling in cases involving legislative systems.

Perhaps the will of the people should be expressed by electing public officials yearly, or quarterly, or monthly. Georgia has adopted two and four-year terms. Does *Gray* say that elections must be held every year? Clearly the answer is no. Does *Gray* say that elections must be held for all State officers? We believe that it does not. *Gray* did not deal with voting procedures and systems.

The extension of *Gray* into that area, if it is to be so extended, awaits the decision of this Court in this case. This Court already has indicated that such extension is not to be made.

In *Fortson v. Dorsey,* 379 U. S. 433 (1965), involving the validity of multi-member senatorial districts, a three-judge District Court in Georgia, citing *Gray,* had held that multi-member districts were an invidious discrimination. *Dorsey v. Fortson,* 228 F. Supp. 259, 263 (N. D. Ga. 1964). On appeal, this Court declined to apply *Gray* to such an election system case, and reversed the lower court.

The lower federal courts, in states other than Georgia, have interpreted *Gray v. Sanders, supra,* as involving voting rights, weight and counting, and not as involving election procedures and systems. In *Pitts v. Kunsman,* 251 F. Supp. 962 (E. D. Pa. 1966), the court, citing *Gray v. Sanders,* held that the election by school directors of an interim operating committee of the school board, required by state law to be elected with consideration given to the principle of proportionate representation according to population, which interim committee was not so constituted, did not violate the Equal Protection Clause, saying:

> This indirect method of election used here does not destroy the concept of equal protection, because the vote of each citizen is still given equal weight in choosing those persons he is in fact called upon to elect. *Id.* at 965.

In *Bush v. Martin,* 224 F. Supp. 499 (S. D. Tex. 1963), *aff'd.* 376 U. S. 222, a reapportionment case, a three-judge court cited *Gray,* saying:

> The present indications are that considerable leeway must be allowed to the States in the diffusion of its political initiative. *Id.* at 511.

In *Lynch v. Torquato,* 343 F. 2d 370 (3rd Cir. 1965), suit was instituted to enjoin the precinct-unit election of the chairman of a county political party who would have the power, upon the death or withdrawal of the party primary nominee between the primary and election, to appoint a substitute nominee as a candidate for public office. In a note to its opinion holding *Gray v. Sanders* to be inapplicable, that court said:

> The question at what stage popular choice must rule in the process of selecting public officials is a difficult one with far reaching implications. Indeed, choice of delegates to party national conventions for the nomination of candidates for President and Vice President would seem logically to be covered by the plaintiffs' view of the reach of the equal protection clause. *Id.* at 372, note 5.

Thus that court indicated that it felt *Gray v. Sanders* did not answer all the questions as to what stage popular choice must rule in the process of selecting public officials. See *Baker v. Carr,* 369 U. S. 186 at 217, 222, 226, 228, 231-232 (1962).

Certainly *Gray v. Sanders* would not invalidate tie-breaking provisions of thirty-six states (Appendix "D", sec. III, p. 42) because such a holding would create situations where the States would be without executive leadership. A "tie-breaking" provision almost necesasrily puts the election of the governor into one or both houses of the legislature. If it is constitutional for the legislature to elect a governor in cases of tie votes, is it not constitutional for the legislature to elect a governor under such conditions as the people by popular vote establish by their constitution?

The court below said that the fact that the people adopted the Georgia Constitution by popular vote was

immaterial in view of this Court's decision in *Lucas v. Colorado General Assembly,* 377 U. S. 713 (1964) (see Appendix "A", p. 30). The Court in *Baker v. Carr,* 369 U. S. 186 (1962), and *Reynolds v. Sims,* 377 U. S. 533 (1964), had held that malapportioned legislatures were unconstitutional. In *Lucas, supra,* the Court held that malapportioned legislatures were unconstitutional (violated the rights of a minority of the people) even though a majority of the people may have voted for such malapportionment. The *Lucas* decision does not, we submit, stand for the proposition that every state constitutional provision must be adopted by unanimous vote to avoid violating the rights of a minority of the people, nor does it stand for the proposition that the people may not, by majority vote, provide for various elective processes for the selection of their public officials.

The requirement that a governor be elected by majority vote is a desirable one in Georgia as evidenced by the fact that the people ratified a constitution so providing. The requirement of a majority vote assures that the governor will be responsible to the majority, if not all, of the voters. The requirement of a majority undoubtedly has dissuaded a candidate of one political philosophy, opposed by a candidate of another philosophy, from encouraging a third person, with views similar to those of his opponent, to make it a three-man race, hoping thereby to spilt the votes of those in sympathy with his opponent's views. This might work well under the plurality system, but not under the majority system because he could expect his opponent to retaliate so that neither would get the required majority short of a runoff.

The fact that many states elect their governors by plurality (Appendix "D", sec. III, p. 42) may have been necessitated by the expenses of campaigning for and conducting runoff elections in order to obtain a majority.

Georgia has preserved the valid and desirable majority requirement, coupled with the right to cast write-in votes. At the same time, Georgia has avoided the expenses of state-wide runoffs by its constitutional provision which the court below has struck down. Primaries and elections are expensive to the candidates. Runoffs are also. A man of moderate means can hardly run for office today without financial support from others. The "others" most willing to contribute seek something in return. By its action, the court below, if not reversed, may have in effect required Georgia to abandon the desirable majority system of election.

Federalism is designed to permit diversity, not to impose uniformity. 1 J. Bryce, THE AMERICAN COMMONWEALTH 353 (revised ed., 1911).

We respectfully submit that the District Court erred in its understanding of *Gray v. Sanders.* In its opinion (Appendix "A", p. 30), the District Court said that once the popular vote system for the election of the governor was adopted, it must be followed to conclusion by popular vote. After expressing the view that if the governor were elected in the first instance by the legislature, such a system would be valid,[7] the court below declined to recognize the right of the people to shift the responsibility for electing the governor to the General Assembly. That court said that the vote of each voter, according to *Gray,* must be treated equally, as if *Gray* said that a voter's vote may never be discounted at any time along the line. Once the votes are in and counted, the winner takes office and the loser goes home. The votes cast for the loser go for naught, as if they had never been counted. The only way the loser's votes could continue to have effect after the election would be the

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[7] Tr. 1, Transcript of November 11, 1966, hearing, page 63.

establishment of a biumvirate or triumvirate, with authority prorated according to votes received. Thus *Gray* does not stand for the proposition that each vote must be treated equally after the election. Georgia has had its election and the fact that some of those votes can not be given effect by the members of the General Assembly in electing a governor is not prohibited by *Gray*.

The court below pointed out that "each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate" (Appendix "A", p. 30). This is true of virtually every act under the republican form of government. A legislator stands as a unit in voting for particular legislation, and his vote eliminates the will of his constituents who are opposed to the enactment. The people knew this when they adopted the republic, and they keep it in mind when voting for, and entrusting this power to their legislators. It is a consequence of the republican form, not grounds for limiting the choice of systems.

If *Gray v. Sanders* were to be applied here, there would appear to be only three reasonable alternatives, none of which guarantees a solution to the problem.

(1) A continuation in office of the incumbent (or, if he resigns, the promotion of the newly-elected Lieutenant Governor); or

(2) A runoff, or runoffs, between the two candidates who received the highest number of votes in the general election; or

(3) A special election open to all candidates, with runoffs therefrom.

In Georgia, the incumbent Governor "shall hold his office during the term of four years, and until his suc-

cessor shall be chosen and qualified." Ga. Const., Art V, Sec. I, Par. I; Ga. Code Ann., § 2-3001 (Appendix "B", p. 34). The incumbent is very popular in Georgia, but someone might assert a constitutional right to have a new governor in order to limit the incumbent to the four-year term for which he was elected and to prevent a dynasty.

The Georgia Election Code (§ 34-1514; Appendix "B", p. 37) does not deal with runoff elections for governor. Code, § 34-1506 (c) specifies that the returns of the election for governor are to be transmitted by the ordinaries to the Secretary of State, "who shall, without opening such returns, cause the same to be laid before the Senate on the day after the two Houses shall have been organized. . . ." (See Appendix "B", p. 37). The Georgia Constitution contains the same provision, Art. V, Sec. I, Par. III (Ga. Code Ann., § 2-3003) (Appendix "B", p. 35). No attack has been made on the method of transmission. It is therefore not possible under existing, unchallenged law to have a runoff in the governor's race on the fourteenth day following the General Election. Hence it appears clear that the Election Code did not contemplate a gubernatorial runoff. This conclusion is fortified by the existence of the provision of the Georgia Constitution here under consideration, Art. V, Sec. I, Par. IV (Appendix "B", p. 35), and the comparable provision of the proposed constitution of 1964, Ga. Laws, May-June, 1964, Ex. Sess., 234, 286, Art. 4, Sec. 7, Pars 3 and 4 (Appendix "B", pp. 35-36). The Georgia Election Code was adopted at the same Extraordinary Session as the proposed constitution. Ga. Laws, May-June, 1964, Ex. Sess., 26-220. Moreover, 14 days is not enough time to receive the official returns, canvass them, print sample ballots, mail them to the ordinaries, print ballots, mail them to absentee voters, and receive completed absentee ballots before a state-wide runoff election.

If a runoff election nevertheless were to be held, some will argue that they have the right, under *Gray v. Sanders,* to cast write-in votes. They will write-in, and then cite *Gray* for the proposition that (372 U. S. at 380): "Every voter's vote is entitled to be counted . . ." in determining whether any man has a majority.[8] In that way a bloc of voters could require a runoff after runoff and block the election process.

If a special election were to be held, prior experience this year indicates that no candidate would receive a majority, and a runoff from that special election would be required, in which write-in votes would be cast in the same fashion and with the same result as indicated above.

If *Gray* were to be extended to require a runoff, or a special election and a runoff, and to permit write-in votes to be counted, then the only reasonable alternative would be election by plurality, not majority. Election by majority rather than simple plurality has long been thought to express the will of the voters more faithfully. Often the second man in a primary has won the runoff; i. e. the majority of the people when choosing between two men, preferred a man who had run second in a field of three or more.

None of the alternatives to the dilemma created by the District Court's order guarantees a solution to the problems that order has created.

Under the circumstances, we respectfully submit that in entering its injunction the District Court abused its discretion and erred in (i) overlooking "the mechanics and complexities of the state election laws" (*Reynolds v. Sims,* 377 U. S. at 585 (1964)) and by (ii) disrupting the election process by "requiring precipitate changes"

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[8] See *Stewart v. Cartwright,* 156 Ga. 192, 197, 118 S. E. 859 (1923), holding that, in a general municipal election, there is a constitutional right to write-in.

that make unreasonable demands on the State and its citizens (*Ibid.*).[9]

In its opinion, the District Court observed that the provision of the 1945 Georgia Constitution in question in these suits came into being in 1824, and said (Appendix "A", p. 28): "These cases bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts." All that is old is not unconstitutional. This same provision was noted, in *Sanders v. Gray,* 203 F. Supp. 158, 162 (D. C. Ga. 1962), without criticism by two of the three members of the court below. Georgia's effort to submit a new constitution to the voters in 1964 was enjoined by the court below. See *Fortson v. Toombs,* 379 U. S. 621 (1965). The provisions the court below now says is outdated was not in the proposed constitution of 1964. Ga. Laws, May-June 1964, Ex. Sess., 234, 286, Art. 4, Sec. 7, Pars. 3 and 4 (Appendix "B", pp. 35-36). Georgia has been in the intolerable position of having been prohibited from adopting a new constitution in the off-year 1964 election, and having its existing constitution declared invalid as being outdated as to the 1966 gubernatorial election.

Contrary to the view held by the District Court, we respectfully submit that *Toombs v. Fortson,* 384 U. S. 210 (1966), and *Fortson v. Toombs,* 379 U. S. 621 (1965), are applicable here, particularly the statement by Justice Harlan, in the decision last cited, that the legislature of Georgia possesses, and is entitled to exercise free from intrusion, the full panoply of legislative powers accorded by Georgia law.

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[9] The Appellees seek to prevent the General Assembly from selecting a governor from the two persons having received the highest number of votes. The Secretary of State, the sole defendant in this suit, cannot enact legislation, and cannot prevent the general Assembly from voting on legislation. How can he prevent it from voting on other matters? He is not a proper party defendant.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be reversed as error and as an abuse of discretion.

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G. ERNEST TIDWELL,
Executive Assistant Attorney General,

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Deputy Assistant Attorney General,

Attorneys for Appellant, Ben W. Fortson, Jr., Secretary of State.

Proof of Service.

I, Harold N. Hill, Jr., Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel

for the Appellant Ben W. Fortson, Jr., that I am a member of the Bar of the Supreme Court of the United States, and that on November 24, 1966, I served the within and foregoing Jurisdictional Statement and Appellant's Brief on the merits upon the Appellees herein named by personally delivering true copies thereof to their Attorneys of Record, Morris Brown and Emmett Bondurant.

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Of Counsel for Appellant.

APPENDIX "A".

OPINION AND ORDER OF THE COURT OF NOVEMBER 17, 1966.

Opinion.

Per Curiam.

The complaint in *Morris, et al. v. Fortson* is a class action seeking a declaratory judgment that Article V, Section I, Paragraph IV, of the Constitution of Georgia, Ga. Code, § 2-3004, conflicts with the Federal Constitution on two grounds. First, it is alleged that it would permit the malapportioned General Assembly of Georgia to elect a Governor of Georgia. Second, it is claimed that the election system set forth in that provision of the Georgia Constitution violates the Equal Protection Clause of the Fourteenth Amendment as interpreted by the Supreme Court in the "Georgia County Unit Case", *Gray v. Sanders,* 1963, 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, and particularly that portion of the decision which announces the "one person, one vote" principle as being required in state elections. The complaint in *Justice, et al. v. Fortson,* rests on these same contentions and others which we do not reach. These cases were consolidated for hearing on the prayer in each for temporary relief.

A three-judge district court was convened in each case under 28 U. S. C. A., § 2281, et seq. Jurisdiction is conferred by 28 U. S. C. A., §§ 1343 (3), 1331, 2201, and 42 U. S. C. A., § 1988. A justiciable controversy is presented within the meaning of *Baker v. Carr,* 1962, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, and its progeny including *Gray v. Sanders,* supra. Being of the view that *Gray v. Sanders,* supra, is controlling, a discussion of the allegations resting on malapportionment is also unnecessary.

The paragraph of the 1945 Georgia Constitution under attack provides as follows:

> "The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

This Georgia constitutional provision came into being as an 1824 amendment to the Constitution of 1798. It thus long antedated the interpretation placed on the Equal Protection Clause of the Fourteenth Amendment in *Gray v. Sanders,* and even the Fourteenth Amendment itself. These cases bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts.

The complaints allege that in the General Election of November 8, 1966, no candidate for Governor received a majority of the total vote cast.[1] The Court takes judicial

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[1] This contention is based on information and belief inasmuch as the Georgia Constitution, Art. V, Sec. I, Paragraph III, and the Georgia Election Code, § 34-1506, requires that the election returns in an election for Governor and certain other constitutional offices, be sealed and transmitted by the Secretary of State to the General Assembly for canvassing and for the issuance of election certificates at the next session of the General Assembly.

cognizance of this public fact. It follows that the Georgia constitutional provision in question is applicable and that the Legislature, pursuant to that provision, is under the duty to seelct as Governor one of the two candidates receiving the highest number of votes in the election. The General Assembly is empowered under this provision to select either candidate, which means that they may select the candidate receiving the lesser number of votes.

The question presented is whether this election system is proscribed by the rationale of the Supreme Court in *Gray v. Sanders,* supra, as it related to the Equal Protection Clause of the Fourteenth Amendment. It is to be noted that the Georgia provision is patterned after the federal electoral college principle as it is embraced in the Twelfth Amendment to the Federal Constitution. But the Court pointed out in *Gray v. Sanders,* supra, that a state may not avoid equality in the vote by following the federal electoral system. Moreover, it makes it plain beyond peradventure that once the class of voters is selected, the vote of each voter is to be treated the same. Here Georgia has selected the class of voters in the election process for Governor. It is popular vote. The system was followed. More than 900,000 Georgia voters participated. The vote of each, according to *Gray v. Sanders,* supra, must be treated equally.

The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. his would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number

may be ignored. In addition, each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.

It is no answer to say that the General Assembly might select the candidate having the greater number of votes and thus no harm would be done. The fact that the system makes the other result possible is sufficient, by analogy with the ill-fated Georgia County Unit System, to make it subject to constitutional attack prior to its use. A fortiori, this system is contrary to the holding of the Supreme Court in *Gray v. Sanders,* supra, and our decision is controlled by that case.[2]

It might be contended that, after following the "one person, one vote" principle in the election for Governor, if a stalemate is reached in that no candidate has a majority of the vote, the people might provide for the selection of a Governor by a method which does not adhere to the "one person, one vote" principle. It can be argued that if the people approve of such deviation from the "one person, one vote" principle, their rights under the Equal Protection Clause are not violated. However, this contention is refuted by the Supreme Court's opinion in *Lucas v. Colorado General Assembly,* 377 U. S. 713, 84 S. Ct. 1472, 12 L. Ed. 2d 632, where the Court held that the fact that a challenged legislative apportionment plan was approved by a popular vote of the people is without significance if the plan adopted fails to satisfy the requirements of the Equal Protection Clause.

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[2] The General Assembly of Georgia may have provided for this eventuality in adopting the Election Code of 1964. It there provided for run-off elections, including elections for the office of Governor, where no candidate receives a majority vote in the election. Code Section 34-1514. We do not now consider the applicability of this run-off method to the contest between the two candidates for Governor who received the highest number of votes.

A declaratory judgment will be entered to the effect that so much of Article V, Section I, Paragraph IV of the Georgia Constitution which authorizes and requires the election of the Governor by the General Assembly under the circumstances here presented is unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> ". . . but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

A judgment accordingly may be presented by counsel for plaintiffs, after notice to counsel for defendant, for entry. A stay will be granted for a period of ten (10) days after the entry of the order, within which time the defendant may seek an additional stay from the Supreme Court of the United States. The Court will retain jurisdiction for such other and further proceedings as may be deemed equitable and just.

This the 17th day of November, 1966.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle,
United States Circuit Judge,

/s/ Griffin B. Bell,
Griffin B. Bell,
United States Circuit Judge,

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

Order.

The Court having heard oral argument on November 11, 1966, and being advised in the premises, it is now

Ordered, Adjudged and Decreed as follows:

1. Those portions of Article V, Section I, Paragraph IV of the Georgia Constitution (Georgia Code, Section 2-3004), which authorize and require the election of the Governor of Georgia by the General Assembly, are hereby declared unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> "... but, if no person shall have such majority then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

2. The defendant, Ben W. Fortson, individually and in his capacity as Secretary of State of Georgia, and all persons having actual notice of this Order, are hereby restrained and enjoined from seeking to cause the election of the Governor of Georgia by the members of the General Assembly.

3. This order is hereby stayed until November 28, 1966, in order to permit the defendant to seek an additional stay of this order from the Supreme Court of the United States.

4. This Court hereby retains jurisdiction to enter such other and further orders as may be required to further implement and effectuate the provisions of this decree.

This 17th day of November, 1966.

/s/ Elbert P. Tuttle,
Elbert P. Tuttle, (m)
United States Circuit Judge,

/s/ Griffin B. Bell,
Griffin B. Bell, (m)
United States Circuit Judge,

/s/ Lewis R. Morgan,
Lewis R. Morgan,
United States District Judge.

APPENDIX "B".

Provisions of Georgia Constitution and Laws Directly Involved in This Litigation.

GEORGIA CONSTITUTION.

Article V.

Executive Department.

Section I.

Paragraph I. (Ga. Code Ann., § 2-3001) Governor; term of office; salary, etc.—The executive power shall be vested in a Governor, who shall hold his office during the term of four years, and until his successor shall be chosen and qualified. The Governor serving at the time of the adoption of this Constitution and future Governors shall not be eligible to succeed themselves and shall not be eligible to hold the office until after the expiration of four years from the conclusion of his term of office. He shall have a salary of . . . The State officers, required by this Constitution to be elected at the same time, for the same term, and in the same manner as the Governor shall also hold office for four years.

Paragraph II. (Ga. Code Ann., § 2-3002) Election for Governor.—The first election for Governor, under this Constitution, shall be held on Tuesday after the first Monday in November of 1946, and the Governor-elect shall be installed in office at the next session of the General Assembly. An election shall take place quadrennially thereafter, on said date, until another date be fixed by the General Assembly. Said election shall be held at the places of holding general elections in the several counties of this State, in the manner prescribed for the election of

members of the General Assembly, and the electors shall be the same.

Paragraph III. (Ga. Code Ann., § 2-3003) Returns of elections.—The returns for every election of Governor shall be sealed up by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to the Secretary of State, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.

Paragraph IV (Ga. Code Ann. § 2-3004). How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.

Proposed (But Unadopted) Constitution of 1964.

Georgia Laws, May-June 1964 Extra Session, page 234 at 286, Article 4, Section 7:

Paragraph 3. Publication of Returns. The members of both houses of the General Assembly shall convene in the Representative Hall, and the President of the Senate

and the Speaker of the House of Representatives shall open and publish the returns under the direction of the General Assembly. The person having the majority of the whole number of votes shall be declared duly elected to each of said offices. Whenever no person is elected in the general election to fill any such office, or whenever any person elected shall die or withdraw prior to taking any such office, the Secretary of State shall call a special election, which shall be held not less than sixty nor more than one hundred twenty days from the date of any such event, to fill such position. The incumbent officer shall continue to serve until his successor can be elected and qualified.

Paragraph 4. Runoffs. Whenever a runoff is required under this Constitution or under any valid law, the runoff shall be considered as a part of the election and may be held at such time after the date prescribed in this Constitution for the election as is fixed by law.

Georgia Laws.

Georgia Laws 1949, page 948 (Ga. Code Ann. § 40-104.1):

Section 4. The General Assembly, in joint session of the Senate and House of Representatives, shall open and publish the returns of the election for Governor as provided by Article V of the Constitution of the State, and shall determine all questions relating thereto, including any contested election, and any question as to the eligibility or qualifications of the person elected Governor, and shall, at the time provided by Section 2 of this Act, inaugurate as Governor the person determined by the General Assembly to have been elected, or the person elected by the General Assembly as provided by the Constitution.

Georgia Code Sections.

Ga. Code § 34-1506 (c):

The returns of every election of Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Comptroller General, Treasurer, Commissioner of Agriculture, and Commissioner of Labor shall be sealed up by the ordinary separately from the other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and shall be transmitted to the Secretary of State, who shall, without opening such returns, cause the same to be laid before the Senate on the day after the two Houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.

Ga. Code, § 34-1514:

Majority vote required to nominate or elect; exception; runoff primary or election.—No candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes, on the fourteenth day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624. The State executive committee of a political party holding a

runoff primary in an area involving two or more counties shall make prior arrangement for financing the cost of holding same.

Ga. Code, § 34-1515:

Special election on failure to nominate or elect or on death or withdrawal of officer elect.—Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a runoff primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position.

APPENDIX "C".

State Law Relating to Election of State Officers by the Legislature and Appointment of State Officers by the Governor.

I. State Officers Elected by Legislature:

State	Office	Constitutional or Statutory Provision
Alaska	State Auditor	Art. IX, Sec. 14
California	Auditor General	Gov. Code, Sec. 10504 Elected by Joint Legislative Audit Committee consisting of 3 members of House and Senate
Connecticut	Judges of Supreme Court (after nomination by Governor)	Art. V, Sec. 2
Georgia	State Auditor	Code Ann. Sec. 40-1801
Hawaii	State Auditor	Art. IV, Sec. 8
Maine	Secretary of State State Treasurer Attorney General	Art. V, Pt. III, Sec. 1 Art. V, Pt. IV, Sec. 1 Art. IX, Sec. 11
Maryland	State Treasurer	Art. V, Sec. 1
Michigan	Auditor General	Art. IV, Sec. 53
New Hampshire	Secretary of State State Treasurer	Part 42, Art. 67 Part 42, Art. 67
South Carolina	Supreme Court Justices	Art V, Sec. 2
Tennessee	Secretary of State State Treasurer Comptroller of Treasury	Art. III, Sec. 17 Art. VII, Sec. 3 Art. VII, Sec. 3
Vermont	Justices of Supreme Court	Chap. 2, Sec. 42
Virginia	Auditor of Public Accounts Judges of Supreme Court	Art. IV, Sec. 82 Art. VI, Sec. 21

II. State Officers Appointed by Governor:

State	Office	Constitutional or Statutory Provision
Alaska	Attorney General	Art. III, Sec. 25 Alaska Statutes, Sec. 44.33.010
California	Public Utility Commission	Art. XII, Sec. 21
Delaware	Secretary of State	Art. III, Sec. 10
Georgia	Superintendent of Banks	Code Ann. Sec. 13-302
Hawaii	Attorney General	Sec. 14A-2
Louisiana	State Bank Commissioner	Art. VI, Sec. 18
Maine	All Judicial Officers Except Probate Judge	Art. V, Pt. 1, Sec. 8
Maryland	Secretary of State	Art. II, Sec. 22
New Hampshire	Attorney General and All Judicial Officers	Part II, Art. 46
New Jersey	Secretary of State Attorney General	Art. V, Sec. 4, Par. 3 Art. V, Sec. 4, Par. 3
New York	Secretary of State Banking Superintendent Superintendent of Insurance	Executive Law, Sec. 90 Banking Law, Sec. 12 Insurance Law, Sec. 10
Pennsylvania	Secretary of Commonwealth Attorney General	Art. IV, Sec. 8 Art. IV, Sec. 8
Texas	Secretary of State Attorney General	Art. IV, Sec. 17 Art. IV, Sec. 23
Utah	Insurance Commissioner Bank Commissioner	Code Ann. Sec. 31-2-2 Code Ann. Sec. 7-1-1
Virginia	Secretary of Commonwealth State Treasurer	Art. IV, Sec. 80 Art. IV, Sec. 81
Wyoming	State Examiner Attorney General	Art. IV. Sec. 14 Statutes Ann. Sec. 9-121

APPENDIX "D".

State Law Relating to Plurality or Majority Voting in Selecting a Governor and Election by the Legislature When the People Fail to Elect.

I.

The following three states provide for election of Governor by majority vote, with election by the State Legislature in the event no candidate receives a majority:

State	Constitutional Provision.
Georgia	Article V, Sec. I, Par. 4 If no candidate receives a majority of the whole number of votes, the Legislature chooses from the top two.
Mississippi	Article V, Secs. 140, 141 If no candidate receives a majority of the electoral votes and also a majority of the popular votes, the House of Representatives chooses from the top two in popular votes. Electoral votes are awarded for each district a candidate carries in an amount equal to the number of the members of the House of Representatives in such districts.
Vermont	Chapter 2, Sec. 39 If no candidate receives the major part of the votes, the Legislature chooses from the top three.

II.

The law in the following two states is unclear to us as to whether a plurality or majority vote is required to elect a Governor, although the State Legislature elects in the event there is a failure to elect by the people:

State	Constitutional Provision
Maine	Article 5, Sec. 3 If no candidate receives *a plurality of all the votes returned,* the House of Representatives chooses two from the top four, if there be that many, and transmits them to the Senate which chooses one of the two. *President of Senate can vote to break a tie vote in the Senate;* i. e., the President of the Senate can elect the Governor.
Rhode Island	Amendment X, Sec. 1 Amendment XI, Sec. 3 If no candidate gets a *plurality of the votes cast,* the Legislature chooses from the top two.

III.

The following thirty-six states provide for the election of Governor by plurality vote with the State Legislature electing in the event of a tie vote:

State	Constitutional Provision
Alabama	Article V, Sec. 115
Arkansas	Article VI, Sec. 3
Arizona	Article V, Sec. 1

State	Constitutional Provision
Colorado	Article IV, Sec. 3
Connecticut	Article IV, Secs. 3, 4
Delaware	Article III, Sec. 3
Idaho	Article IV, Sec. 2
Illinois	Article V, Sec. 4
Indiana	Article V, Secs. 4, 5
Iowa	Article IV, Secs. 3, 4
Kansas	Article I, Sec. 2
Louisiana	Article V, Sec. 2
Maryland	Article II, Secs. 2, 3, 4
Missouri	Article IV, Secs. 17, 18
Montana	Article VII, Sec. 2
Nebraska	Article IV, Sec. 4
New Hampshire	Part II, Article 42
New Jersey	Article V, Sec. 4
New Mexico	Article V, Sec. 2
Nevada	Article V, Sec. 5
North Carolina	Statutory Provision 163-99
North Dakota	Article III, Sec. 74
Ohio	Article III, Sec. 3
Oklahoma	Article VI, Sec. 5
Oregon	Article V, Secs. 4, 5
Pennsylvania	Article IV, Sec. 2
South Carolina	Article IV, Sec. 4
South Dakota	Article IV, Sec. 3
Tennessee	Article III, Sec. 2

State	Constitutional Provision
Texas	Article IV, Sec. 3
Utah	Article VII, Sec. 2
Virginia	Article V, Sec. 70
Washington	Article III, Sec. 4
West Virginia	Article VII, Sec. 3
Wisconsin	Article V, Sec. 3
Wyoming	Article IV, Sec. 3

IV.

The law is unclear in the following nine states as to how a Governor is to be chosen in the event of a tie vote or other failure to elect:

State	Constitutional or Statutory Provision
Alaska	Article III, Sec. 3
California	Article V, Sec. 4
Florida	Article IV, Sec. 2
Hawaii	Article IV, Sec. 1
Kentucky	Section 70. Governor is elected by plurality vote *with a tie to be determined by lot* in such manner as the Legislature may direct.
Massachusetts	Article XIV, Sec. 116
Michigan	Article V, Sec. 21 Vol. 5, Michigan Statutes Ann. Sec. 6-1061
Minnesota	Article V, Sec. 2
New York	Article IV, Sec. 1

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such,
Appellant

v.

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated,
Appellees

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*

v.

LARRY G. JUSTICE, MRS A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY P. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF OF APPELLEES JOHN MORRIS AND FLORENCE ROBIN

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IN THE

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v.

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Appellees

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Brief of Appellees John Morris and Florence Robin

ARGUMENT

The Constitution of Georgia, written but four years after *United States* v. *Classic,* 313 U.S. 299 (1941), was adopted in a one-party state in a racially segregated time. Few even then could see the coming of change in economic and racial matters, in the emergence of a second political party and, occasionally, a

third party or independent movement. But change, revolutionary change, was coming. The seeds of revolution were being planted in the law.

Classic, supra, held that the right to vote in primaries and to have votes so cast, counted, was a right "secured by the Constitution." 313 U.S. at 307.

Brown v. *Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954), ended a long struggle—and began a new one—to open other meaningful doors of American life to Negroes.

Baker v. *Carr,* 369 U.S. 186 (1962), *Gray* v. *Sanders* 372 U.S. 368 (1963) and *Reynolds* v. *Sims,* 377 U.S. 533 (1964), broke ground for electoral reform.

Each of these decisions opened the gates for democratic revolution, revolution protected, indeed guaranteed, by the First, Fourteenth, and Fifteenth Amendments.

The South, slowly at first, then more quickly, became a land of ferment, a frontier, a battleground of law against the order—new law against a harsh old order.

In Georgia, in 1966, the armies of this revolution met in the political arena. The results?—a draw.

THE ELECTIONS OF 1966

Lester G. Maddox and Ellis G. Arnall actively campaigned for the Democratic nomination for Governor. In the first primary election held September 14, 1966, Messrs. Arnall and Maddox ran first and second in a field of six. Mr. Arnall received 231,480 votes. Mr. Maddox received 185,672 votes (R. 141) (Requests for Admissions, No. 6, p. 3).

Prior to the runoff primary of September 28, 1966, Mr. Arnall and his Democratic supporters accused

Mr. Callaway and the State's Republican leadership of urging that Republicans vote in the Democratic Primary. The purpose of this scheme was said to be the nomination of Mr. Maddox. The theory behind the plan was that Mr. Maddox would be easier for Mr. Callaway to defeat in the General Election.[1]

And according to observers Republicans did enter the Democratic runoff primary. Mr. Maddox emerged the victor with a vote of 443,055 votes to Mr. Arnall's 373,004. (R. 141-2) (See e.g. "If Not Write-Ins, Then What?", The Atlanta *Constitution*, November 14, 1966, p. 4 (R. 221) contained herein as Appendix C, *post*, pp. 77a-78a).

Mr. Callaway did not seek nomination via the primary route. He became the Republican nominee by petition (R. 142) (Request for Admission No. 8, p. 4).

Immediately following the Democratic primary election the ranks of that party split. Intensity of feeling was implicit in the remarks of the Mayor of the State's largest city, Atlanta.

"It is deplorable that the combined forces of ignorance, prejudice, reactionism and the duplicity of many Republicans voters have thrust upon the State of Georgia Lester Maddox, a totally unqualified individual as the Democratic nominee for Georgia," said Ivan W. Allen. "The seal of the great State of Georgia lies tarnished," he continued. "The wisdom, justice, and moderation espoused by our founding fathers must not be surrendered to the rabble of prejudice, extremism, buffoonery and incompetency."[2]

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[1] See e.g., The Atlanta *Constitution*, September 8, 1966, p. 11, September 22, 1966, p. 28.

[2] The Atlanta *Journal*, September 29, 1966, p. 1; The Atlanta *Constitution*, September 30, 1966, p. 1.

Four days later, Charles Longstreet Weltner, a member of the House of Representatives from Georgia's Fifth Congressional District, followed suit. Mr. Weltner had won renomination to Congress. He resigned that nomination saying, ". . . While I cannot violate my oath, neither can I violate my principles. I cannot compromise with hate."[3] He too would write-in.

On October 4, 1966, many Georgians, rejecting the nominees of both major parties, met to consider a candidate for whom they might vote.[4] Their right to cast write-in ballots could not be disputed.[5] A commit-

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[3] The Atlanta *Journal*, October 3, 1966, p. 1; The Atlanta *Constitution*, October 4, 1966, p. 1.

[4] The Atlanta *Constitution*, October 5, 1966, p. 1; The Atlanta *Journal*, October 5, 1966, p. 1.

[5] See Georgia Election Code Sections 34-1206 (c) (d) (g), 34-1220 (d) (e), 34-1224 and 34-1315 (d), the latter of which provides, in part, "An elector may, at *any* election, vote for any person for any office . . . by a write-in ballot containing the name of such person . . ." [Emphasis supplied]. This right, under Georgia law, is constitutional in nature. *Stewart* v. *Cartwright*, 156 Ga. 192, 197, 118 SE 859 (1923). See also: Note: *Ballot—Voting Machine—Right of Voter to Write-In Name of Candidate*, 6 George Washington Law Review 540 (1937). Regarding the general nature of the right to cast write-in ballots in other states, see e.g., *Jackson* v. *Norris*, 195 A. 576, 586 (Md. 1937): "For this precious right to reject, which is implicit in his right to choose, there is no equivalent nor constitutional substitute."

People v. *President of Wappingers Falls*, 144 N.Y. 616, 620, 39 NE 641, 642 (1895): "The constitution confers upon every citizen meeting the requirements specified therein the right to vote at elections for all officers that are elective by the people, and there is no power in the legislature to take away the right so conferred.

Howell v. *Bain*, 156 P. 2d 576, 582 (Ore. 1945): "A voter has the constitutional right to vote for whomever he pleases and, if the names of the candidates on the printed ballot do not meet with his

tee, Write-in Georgia, was organized, established headquarters and began the campaign for Mr. Arnall. On October 9, 1966, they organized a mass rally.[6] They had no active candidate—Mr. Arnall would neither publicly encourage nor discourage the movement—but the campaign was underway.

On October 19, 1966, legal skirmishing began. A committee of lawyers from Write-In Georgia met with Georgia's Secretary of State seeking a ruling from him on several matters. One of their questions concerned the applicability of Section 34-1514 of the Georgia Election Code which seemed to them to provide for a runoff election in the event no one received a majority vote in the General Election. On October 21, 1966, Georgia's Attorney General advised the Secretary of State, in part, as follows (R. 142, 145-8) (Requests for Admissions, No. 9, p. 4):

> The last question posed was: "Is the provision of Code Section 34-1514, providing for a runoff election, in instances where no candidate receives a majority of the votes cast, on the fourteenth day after the day of the holding of the election, authorized by the provisions of Article V, Section I, Paragraph II, of the Constitution, which per-

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approval, he may 'write in' the name of the person whom he desires to have elected to the office."

McCrary on Elections, 4th Ed., pp. 508-509, Sec. 700 (1897). "Statutes which deny the voter this privilege [the right to cast write-in ballots] are in conflict with the constitutional provision guaranteeing the right of suffrage to every citizen possessing the requisite qualifications and are void. Legislatures may provide for the printing of an official ballot and prohibit the use of any others, but the legislature cannot restrict the elector in this choice of candidates, nor prohibit him from voting for any other than those whose names appear on the official ballot."

[6] The Atlanta *Constitution*, October 10, 1966, p. 1; The Atlanta *Journal*, October 10, 1966, p. 1.

mits the General Assembly to fix the date on which the election of the Governor shall take place?" Article V, Section I, Paragraph II, of the Georgia Constitution of 1945, provided that the first election for Governor under the Constitution would be held on Tuesday after the first Monday in November of 1946, and that an election should take place every four years, thereafter, on said date, until another date be fixed by the General Assembly. The Georgia Election Code enacted in 1964 made no change in the date of the November election for the Office of Governor. See Code Section 34-802. Code Section 34-1514, relied upon by those who propounded the question to you, relates to a "runoff election."

Moreover, Paragraphs III and IV of Section I of Article V of the Constitution are specific as to the transmission of the returns for the election of Governor and as to what happens in the event no person receives a majority of the votes cast for Governor. Although the *unofficial* results of an election are made known, via the news media, shortly after the close of the polls, the Constitution provides that the official returns for the election of the Governor shall be sealed up by the managers, addressed to the President of the Senate and Speaker of the House of Representatives, and transmitted to you, and that you, without opening said returns, shall lay them before the Senate on the day after the two Houses shall have been organized. Those returns are to be opened and published before a joint session of the General Assembly and if no person shall have a majority, "then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election . . . the General Assembly shall immediately, elect a Governor viva voce" by a majority of the members present.

Therefore, any construction of Code Section 34-1514 as an effort to change the date on which the election of the Governor occurs, would contravene

the specific provisions of Paragraphs III and IV, Section I, Article V, of the Georgia Constitution. Thus, it is my official opinion that the answer to the fourth question should be "no."

Very truly yours,

/s/ ARTHUR K. BOLTON
Attorney General

Thus, as far as the State of Georgia was concerned the State's Constitution governed. Section 34-1514 of the Georgia Election Code did not. Write-In-Georgia's lawyers were wrong. There would be no runoff. The General Assembly would decide.

Subsequently, in hundreds of newspaper articles,[7]

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[7] Appendix B, hereto, consists of a copy of the Motion for Preliminary Injunction filed by Appellees Morris and Robin and is a part of the record herein. Pages 21a, et seq. of Appendix B consist of reproductions of articles from newspapers in the Atlanta area which related to the question of legislative selection of a Governor if no majority vote was obtained in the General Election of November 8, 1966. This Appendix does not contain all of the articles in those newspapers which relate to this subject.

In *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949) aff'd 336 U.S. 933 (1949), the District Court in ascertaining the intention of the Legislature and the electorate considered statements in the *Alabama Lawyer* (a publication of the Alabama Bar Association) and said ". . . The *Alabama Democrat*, a campaign document in the form of a newspaper published in support of the adoption of the Boswell Amendment consisted in its entirety of arguments urging the voters to adopt the Amendment for the purpose of restricting voting by Negroes." . . . Similarly, an editorial of the *Talladega Home*, reproduced in said document, asked the question: "What is the Boswell Amendment?" and answered the question by saying, "It is a measure designed simply and solely to enable registrars legally to hold down the number of Negro registrants." (Ibid. p. 880). See also *Sheppard* v. *Maxwell*, 384 U.S. 333, 351 (1966) and cases cited therein. "At the same time, we did not consider dispositive the statement of each juror that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles." [Citations omitted]

on radio and television, Georgia voters were told that in the event no candidate obtained a majority vote the General Assembly would select the Governor. (R. 192 et seq.) (See Appendix B, *post,* pp. 21a, et seq.)

This ruling materially assisted Mr. Callaway. The thesis of many of his supporters was that a write-in vote was a vote for Mr. Maddox since the malapportioned General Assembly was controlled by Democrats, each of whom took the same loyalty oath taken by Mr. Weltner, none of whom refused to seek election.

The crux of the Republican argument was that Negro and white liberal voters were out-of-luck. They had but two practical choices, Messrs. Maddox and Callaway, and, even if to those voters the effective option seemed to be a particularly " 'grisly', hard, Hobson's choice,"[8] their man, Mr. Callaway, was the less grisly.

Thus the General Election was held on November 8, 1966, under circumstances which would have misled the most intelligent of voters. The state constitutional provision which was contemplated valid was ruled void. The voters, indeed, the candidates themselves, were deceived as to the law. That the deception was not a part of a venal master plan makes its existence as a fact, no less certain.[9]

Also on October 19, 1966, an action was filed in the United States District Court for the Northern District

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[8] cf. *Whitus* v. *Balkcom,* 333 F. 2d 496, 499 (1964) cert. den. 379 U.S. 931 (1964).

[9] See Note: *Avoidance of an Election or Referendum When The Electorate Has Been Misled,* 70 Harvard Law Review 1077 (1957) cf. Section 34-1708 (d) Georgia Election Code. Also cf. *Crowe* v. *Bryan,* 215 Ga. 661, 113 SE 2d 104 (1960)

See also Note: *Annulment of a General Election,* 18 Mod. L. Rev. 495 (1955).

of Georgia (*Morris et al.* v. *Fortson, et al.*, D.C. N.D. Ga., CA-10483). There the District Court declared unconstitutional and in violation of the Voting Rights Act of 1965, Act No. 399 of the Georgia General Assembly, General Session, 1966 (Georgia Laws 1966, pp. 185-186) which limited the assistance illiterates might receive in casting their ballots. The court retained jurisdiction "for the purpose of . . . post-election matters . . . having to do with the tabulation of such write-in ballots as are cast."

Appellees are advised that attorneys for Write-In Georgia who have received hundreds of complaints regarding the casting and counting of write-in ballots intend to move for such a tabulation in the District Court. The Secretary of State of Georgia has called a public hearing regarding election complaints for December 1, 1966, to be held in the State House of Representatives.

THE GEORGIA ELECTION CODE WAS NOT WRITTEN WITH THE GEORGIA CONSTITUTION OF 1945 IN MIND

In 1964 the General Assembly of Georgia embarked on two rather ambitious projects. They wrote a new state constitution (Georgia Laws, Ex. Sess., May-June, 1964, pp. 234 et seq.) and adopted the Georgia Election Code. But legislative ambitions were thwarted when the District Court forbade a vote on the new constitution due to the malapportionment of the General Assembly. See *Fortson* v. *Toombs*, 379 U.S. 621 (1965). Whatever the General Assembly's intention regarding the Georgia Election Code might have been, that Code must be construed with the Constitution of Georgia of 1945 rather than the proposed Constitution which was never adopted by the people.

ARTICLE V, SECTION I, PARAGRAPH IV OF THE CONSTITUTION OF GEORGIA IS UNCONSTITUTIONAL ON ITS FACE AND IN ITS APPLICATION

The rule of *Gray* v. *Sanders,* 372 U.S. 368 (1963), envelopes this case. Two hundred and five House seats and fifty-four Senate seats make up the General Assembly.[10] The apportionment of those seats has been held unconstitutional, but the General Assembly has until May 1, 1967, to further apportion itself in accordance with the mandate of *Reynolds* v. *Sims, supra.* (*Toombs* v. *Fortson,* 241 F. Supp. 65 (1965), aff'd. 384 U.S. 210 (1966))

In *Gray* the unit system applied to the selection of nominees. In this case the unit system applies to the

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[10] Forty-six members of the Democratic Party, seven members of the Republican Party and one Independent were elected to the Georgia Senate in the November 8, 1966, General Election. One hundred eighty-three Democrats and twenty-one Republicans were elected to the Georgia House. A runoff election was held on November 22, 1966, to fill a House Seat. It appears that the runoff remedy provided by Section 34-1514 of the Georgia Election Code is no longer available. A runoff ". . . election shall be held between the two candidates receiving the highest number of votes, on the 14th day after the day of holding of the first . . . election, unless such runoff date is postponed *by court order.*" [Emphasis supplied] (ibid) No order of any court, state or federal, barring the holding of a runoff election was entered. Co-Appellees, *Justice,* et al. requested such an election. Appellees *Morris* and *Robin* requested that a special election be held. The District Court acted on neither request. No appellee nor the State specifically requested an order barring a runoff election. The issuing of the injunction requested by Appellees *Morris* and *Robin* would have necessarily excluded the runoff remedy. The time for a runoff election to have been held having expired, it seems that the Section 34-1514 remedy is no longer available and, assuming the applicability of the Georgia Election Code, the Section 34-1515 special election remedy applies. It should be noted that the District Court discussed this matter with counsel. (R. 83-4) (Transcript of Hearing, pp. 83-84). But, no "court order" was issued.

final step in the election process, the General Election. Since this case involves the final rather than a preliminary step in the election process, the thesis of *Gray* is all the more applicable. When the poll curtain opens in a general election the voter has made his final decision. There is no more an opportunity to cast a write-in ballot, nominate a third or fourth party candidate, or otherwise reject the nominees of the major political parties. (Cf. *United States* v. *Classic, supra)*

The thrust of *Gray* v. *Sanders, supra,* is—once the class of voters is selected each individual voter is entitled to cast an undiluted vote, a vote equal to each other vote cast in the overall area from which the election takes place, in this instance, the state; that one vote so cast by that one person is not to be diluted, weighted or denied by any system of representative filtration.

But, under the challenged Georgia constitutional provision the General Assembly may select for Governor a man who received not merely less than a majority of the votes cast but, indeed, the man who received less than a plurality of the popular vote—*the number two man.*

This procedure simply cannot jibe with a one-person, one-vote concept of democratic self-government. *Gray* rejected the Federal analogy as did *Reynolds* v. *Sims, supra.* On the state level the electoral college principle cannot be used.

To further compound the wrong of Georgia's constitutional system there is no requirement that members of the General Assembly cast their votes for the candidate who received at least a plurality of the

votes in his own district. The member of the General Assembly may vote for the candidate who ran second. He may absent himself and cast no vote at all, thereby depriving voters in his district of any voice at all in the selection process. Cf. *Bond et al.* v. *Floyd, et al.*, Oct. Term, 1966, No. 87. Even if present and voting for the candidate who received the plurality or majority vote in his district, his vote deprives those who voted for the minority candidate of their right to vote and have their votes counted. *United States* v. *Classic, supra.* No matter how he votes he is totally irresponsible to his constituency due to voice voting.

To further compound the offense of unit selection here, there is the problem of the apportionment of the General Assembly, an apportionment already declared to be violative of the Equal Protection Clause.[11]

To allow the selection of Georgia's Governor by representatives of a minority of Georgia's citizens who could select the candidate who finished second in a general election and disregard the will of at least a

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[11] *Toombs* v. *Fortson*, 241 F. Supp. 65 (1965) aff'd 384 U.S. 210 (1966). The denial of a speed-up order regarding the apportionment of the General Assembly does not indicate approval of that apportionment for selection of a Govenor. See *Fortson* v. *Toombs, infra.* There the District Court refused to allow a vote on a proposed new constitution for Georgia. That Constitution proposed by a malapportioned General Assembly provided for the proposal of amendments by later General Assemblies by a two-thirds vote. Although Georgia's General Assembly must be properly apportioned by May 1, 1967, to allow the present General Assembly to select a Governor for a term of four years would place the power of the veto over the head of the properly apportioned General Assembly. (Article V, Section I, par. XVI, Constitution of Georgia (Section 2-3015 Georgia Code Annotated) See also remarks of the District Court in this case at R. 28-29 (Transcript of Hearing, pp. 28-29).

plurality of voters in the state-at-large and in their own districts and totally disregard the votes of their own constituents with whom they disagree, completely emasculates the Equal Protection Clause. Georgia's system thwarts the will of at least a plurality of voters, as surely as does Kentucky's system of selecting a Governor by lot in the event of a tie. Constitution of the State of Kentucky, Section 70.

At least in Kentucky some voters have a fifty-fifty chance. But, in Georgia the deck is stacked in favor of minority rule. No matter how the electorate plays its hand some voters are lost in the shuffle. No electoral system which permits this can survive constitutional scrutiny.

THIS COURT SHOULD PROVIDE GUIDANCE FOR THE COURT BELOW OR FOR THE STATE OF GEORGIA UNDER WHICH A REMEDY MAY BE SELECTED

In *Reynolds* v. *Sims,* 377 U.S. 533, 578 (1964), after expressing a desire for the development of the law on a case-by-case basis, this Court said: "Thus we proceed to state here only a few rather general considerations which appear to us to be relevant." The Court then offered those considerations for the Legislatures of the States and the Courts of the United States. 377 U.S. at 578-581. Those "general considerations" served the nation well. For despite the existence of a "political thicket," a thicket so dense that prior to 1964 many men could not see in it any rays of light, there has been little difficulty in finding solutions for apportionment problems.[12]

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[12] Cf. *Brown* v. *Board of Education of Topeka, Kansas,* 349 U.S. 294, 301 (1955). The words "deliberate speed" have often resulted in deliberate defiance, little speed.

In *Miranda* v. *Arizona,* 384 U.S. 436, 444 (1966), this Court stated ". . . The following measures are required." It then gave guidance to those affected by the decision.

This case is charged with emotion. Upon its results the highest political office in Georgia will be decided. There is a need for rapid adjudication of the rights of all parties. The situation presents a host of opportunities for litigation, some of which may find its way back to this Court. Thus, this Court should either fashion a remedy now or, at least, set the style by which the remedy should be fashioned.

Here each party seeks a remedy and, at least implicitly, guidance.

Appellees in *Justice* et al. seek a runoff election under the provisions of Section 34-1514 of the Georgia Election Code.[13] Appellees in *Morris* seek a special election under the provisions of Section 34-1515 of the Georgia Election Code.[14] The Court below sought

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[13] In their complaint and in briefs below they sought the ordering of a runoff election. The District Court in footnote 2 of its opinion, Appendix A hereto, *post,* p. 6a, refused to consider the question and entered no "court order" to halt the runoff election, nor was it requested to do so. See also R. 83 (Transcript of Proceedings, p. 83) and the *Brief in Opposition to Application for a Stay* of Co-Appellees, *Justice* et al. See also their *Request for Emergency Hearing.*

[14] See *Motion for Preliminary Injunction* of Appellees *Morris* and *Robin* (R. 184) Appendix B *post,* p. 11a.

that the state solve the problem itself.[15] And the state obviously needs to know what measures are required in this situation.[16]

NEITHER THIS COURT NOR THE COURT BELOW NOR ANY STATE COURT, STATE OFFICIAL, OR LEGISLATIVE BODY SHOULD BE ALLOWED TO FASHION A REMEDY THAT WOULD BIND THE HANDS OF THE GEORGIA ELECTORATE

There has been a complete failure of election in Georgia. Georgia citizens relied upon the constitutionality of—and cast their ballots under—the Constitution of Georgia. The declaration of the unconstitutionality of Article V, Section 1, Paragraph IV (Sec. 2-3004, Georgia Code Annotated) voids the General Election. The Georgia electorate will have been misled, not by the deliberate acts of the candidates, not by the communications media, not by the Attorney

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[15] Judge Bell: "That is the simple part of the case. The hard part is the remedy. That is what you, of course, don't want to discuss, and I am not going to suggest that any more, because you can put in your brief anyway, if you want to, but that is what you really ought to be giving some serious thought to, the remedy."
Judge Tuttle: "... the court may, since we would like to get out of this thicket, we hope that having expressed the tentative view your clients may rethink their attitudes and may make it unnecessary for us ever to determine ourselves what the remedy should be, because you may take action yourself."
Judge Bell: "Formulate your own remedy."
Judge Tuttle: "That would dispose of the matter."
Judge Morgan: "And be in the interest of time."
(R. 79-80) (Transcript of Proceedings, pp. 79-80)
[See also R. 81-82, *Transcript of Proceedings*, pp. 81-82]

[16] See R. 238-239, *Notice of Appeal*, III, (3). See also *Application for Stay*, Sections 9-10, pp. 6-7.

General of Georgia, but by the State's Constitution itself.[17]

The effect of this deception might be disputed. But that there was an effect is clear. How influential the knowledge that the election would be ultimately decided by the General Assembly was cannot be known. But it may very well be that one of the two candidates of the major political parties might not have been one of the two high men in the November 8, 1966 General Election. Thus to order—or for that matter, allow—a runoff election between Messrs. Callaway and Maddox while barring write-in votes would result in a substantial deprivation of the right to vote. To order or allow exercise of the effective right of nomination by a court, state or Federal, the State's Attorney General, the State's Secretary of State, or the State's General Assembly would constitute a devastating blow to the right of free suffrage, a nomination system akin to appointment, a selection system akin to that of some foreign lands where the right to vote is protected, only the choice restricted. The people of Georgia—all of them, not merely those who cast write-in ballots—are entitled to an untrammelled vote for governor, a vote not influenced by deception in the law.

Whether or not write-in votes should be allowed in a runoff from a special election constitutes a totally separate question from whether or not they should be allowed in a runoff from the November 8, 1966, General Election. The circumstances surrounding the November 8, 1966, General Election make it clear that that election must not be used as a sort of nominating

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[17] See footnote 9, *infra*, p. 8.

procedure for a runoff without the right to cast write-in votes.

This Court through *Reynolds* v. *Sims, supra,* and *Gray* v. *Sanders, supra,* emphasized the majesty of one man's one vote. The personal nature of the right to vote and the guarantee of *Classic* that that vote be counted in the nominating process are clear. This Court also emphasized the majesty of majority rule and the right of the majority not be deprived by law of the right to govern.[18]

To many voters the nominees of the major political parties often offer an echo, not a choice. For example, until recently, in the south all major political candidates were publicly committed to a policy of racial segregation. That policy, although contrary to the Constitution of the United States when involving governmental facilities, places Negro citizens, guaranteed the right to vote by the Fifteenth Amendment of the Constitution of the United States, in the unenviable position of being constantly required to cast their ballots in each election for the lesser of two evils; the candidate who, to them, is the less grisly. The casting of a ballot by an American citizen is the most important expression of opinion he utters. He is catalogued and

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[18] Although the Federal analogies are sometimes inapposite in voting and reapportionment cases, *Gray* v. *Sanders, supra; Reynolds* v. *Sims, supra,* it should be noted that the President of the United States—the occupant of the most powerful office the world has ever known, an office which with but one mistake of judgment could end life on earth,—is not necessarily selected by a majority vote. Thirty-six states do not require that their chief executives be elected by a majority vote. In eleven states the law is unclear. Only three states, Georgia, Mississippi, and Vermont require this. See Appendix D, Brief of Appellants, herein which consists of a compendium of state law on this point.

analyzed and his behavior is predicted. Early on election evening he is told for whom he voted and why and by how much. But regardless of what he is told, only he knows how and why he voted as he did. And by the casting of his ballot he becomes personally involved and responsible for the policies of his government. For the American voter there can be no denial of participation in the acts of government.

The only rationale for majority rule while allowing the minority to reject those candidates who have access to the ballot is that the individual shall not have thrust upon him the choice of candidates for whom he may vote.

The voters' right to reject does not necessarily conflict with the majority's right to elect. For instance, in Georgia the reason for the write-in campaign was the unfairness of the apparent Republican cross-over, the nomination of both candidates by Republican voters. It was this kind of "one man, two vote rule" for Republicans that prompted the write-in campaign in the first place. A free and open election and a runoff from that special election would cure that disease.

THE MOST APPROPRIATE REMEDY IS THAT OF A SPECIAL ELECTION TO BE HELD EITHER UNDER EXISTING GEORGIA STATUTES OR A NEW STATUTE TO BE ADOPTED BY THE GENERAL ASSEMBLY OR UNDER AN ORDER OF THIS OR THE LOWER COURT TO THE DEFENDANT SECRETARY OF STATE

"[A]n election that arises from some exigency or special need outside the normal routine; . . ." is the statutory definition of the words "special election" (Sec. 34-103 (ab) Georgia Election Code). That the

failure of election November 8, 1966, fits this definition seems hardly questionable.[19]

A special election under the provisions of Section 34-1515 of the Georgia Election Code would leave the people of Georgia free to determine whom they desire to serve them as Governor. In the event no majority vote is obtained in that election, a runoff might then be held. Any restriction on the right to cast write-in votes in a runoff from a special election must be approached with caution. But it is far better that restrictions be made at that stage of the election process rather than at an earlier stage where the very candidacy of the men running for office is suspect. The people's right to elect their highest state officer would be retained.

CONCLUSION

The judgment of the Court below should be affirmed and the case remanded for future proceedings not inconsistent with the opinion of this Court. The opinion of this Court should contain words of guidance for the lower court regarding the remedy to be utilized either by that court or by Georgia, itself. That guidance should indicate that the November 8, 1966, General

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[19] Georgia's General Assembly provided for a special election for Governor in the event a vacancy occurred in the office ". . . by death, resignation, or otherwise . . ." (Section 40-102, Georgia Code Annotated). In light of Article V, Section I, Para. VII, (Sec. 2-3007, Georgia Code Annotated) providing for the assumption of office by the Lieutenant Governor, this section appears to have been superseded. But the codifier notes that this section has not been treated as repealed. Repealed or not there is no contention that, as a matter of state law, this section applies in this situation. Nor does it apply as a matter of fact. Governor Sanders has indicated that he will not resign until his successor has been "chosen."

Election should in no way determine for whom the people of Georgia are to be allowed to vote.

Respectfully submitted,

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APPENDIX A

The Opinion and Order of the United States District Court for the Northern District of Georgia (Atlanta Division).

[Filed Nov. 17, 1966]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 10533

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated, *Plaintiffs*

vs.

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such, *Defendant*

Civil Action No. 10546

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BYRAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, AND EVERETT WILLIAMS, *Plaintiffs*

vs.

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Defendant*

Before Circuit Judges Elbert P. Tuttle and Griffin B. Bell and District Judge Lewis R. Morgan.

PER CURIAM.

The complaint in *Morris, et al.* v. *Fortson* is a class action seeking a declaratory judgment that Article V, Section I, Paragraph IV of the Constitution of Georgia, Ga. Code § 2-3004 conflicts with the Federal Constitution on two grounds. First, it is alleged that it would permit the malapportioned General Assembly of Georgia to elect a Governor of Georgia. Second, it is claimed that the election system set forth in that provision of the Georgia Constitution violates the Equal Protection Clause of the Fourteenth

Amendment as interpreted by the Supreme Court in the "Georgia County Unit Case", *Gray* v. *Sanders,* 1963, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed. 2d 821, and particularly that portion of the decision which announces the "one person, one vote" principle as being required in state elections. The complaint in *Justice, et al.* v. *Fortson* rests on these same contentions and others which we do not reach. These cases were consolidated for hearing on the prayer in each for temporary relief.

A three-judge district court was convened in each case under 28 U.S.C.A. § 2281, et seq. Jurisdiction is conferred by 28 U.S.C.A. §§ 1343(3), 1331, 2201, and 42 U.S.C.A. § 1988. A justiciable controversy is presented within the meaning of *Baker* v. *Carr,* 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663, and its progeny including *Gray* v. *Sanders,* supra. Being of the view that *Gray* v. *Sanders,* supra, is controlling, a discussion of the allegations resting on malapportionment is also unnecessary.

The paragraph of the 1945 Georgia Constitution under attack provides as follows:

> "The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

This Georgia constitutional provision came into being as an 1824 amendment to the Constitution of 1798. It thus long antedated the interpretation placed on the Equal Protection Clause of the Fourteenth Amendment in *Gray* v. *Sanders,* and even the Fourteenth Amendment itself. These cases bring into focus the question of gearing the Georgia Constitution to updated federal constitutional concepts.

The complaints allege that in the General Election of November 8, 1966, no candidate for Governor received a majority of the total vote cast.[1] The Court takes judicial cognizance of this public fact. It follows that the Georgia constitutional provision in question is applicable and that the Legislature, pursuant to that provision, is under the duty to select as Governor one of the two candidates receiving the highest number of votes in the election. The General Assembly is empowered under this provision to select either candidate, which means that they may select the candidate receiving the lesser number of votes.

The question presented is whether this election system is proscribed by the rationale of the Supreme Court in *Gray* v. *Sanders,* supra, as it related to the Equal Protection Clause of the Fourteenth Amendment. It is to be noted that the Georgia provision is patterned after the federal electoral college principle as it is embraced in the Twelfth Amendment to the Federal Constitution. But the Court pointed out in *Gray* v. *Sanders,* supra, that a state may not avoid equality in the vote by following the federal electoral system. Moreover, it makes it plain beyond peradventure that once the class of voters is selected, the vote of each voter is to be treated the same. Here Georgia has

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[1] This contention is based on information and belief inasmuch as the Georgia Constitution, Art. V, Sec. I, Paragraph III, and the Georgia Election Code, § 34-1506, requires that the election returns in an election for Governor and certain other constitutional offices, be sealed and transmitted by the Secretary of State to the General Assembly for canvassing and for the issuance of election certificates at the next session of the General Assembly.

selected the class of voters in the election process for Governor. It is popular vote. The system was followed. More than 900,000 Georgia voters participated. The vote of each, according to *Gray* v. *Sanders,* supra, must be treated equally.

The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. This would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored. In addition, each legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate.

It is no answer to say that the General Assembly might select the candidate having the greater number of votes and thus no harm would be done. The fact that the system makes the other result possible is sufficient, by analogy with the ill-fated Georgia County Unit System, to make it subject to constitutional attack prior to its use. A fortiori, this system is contrary to the holding of the Supreme Court in *Gray* v. *Sanders,* supra, and our decision is controlled by that case.[2]

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[2] The General Assembly of Georgia may have provided for this eventuality in adopting the Election Code of 1964. It there provided for run-off elections, including elections for the office of Governor, where no candidate receives a majority vote in the election. Code Section 34-1514. We do not now consider the applicability of this run-off method to the contest between the two candidates for Governor who received the highest number of votes.

It might be contended that, after following the "one person, one vote" principle in the election for Governor, if a stalemate is reached in that no candidate has a majority of the vote, the people might provide for the selection of a Governor by a method which does not adhere to the "one person, one vote" principle. It can be argued that if the people approve of such deviation from the "one person, one vote" principle, their rights under the Equal Protection Clause are not violated. However, this contention is refuted by the Supreme Court's opinion in *Lucas* v. *Colorado General Assembly,* 377 U.S. 713, 84 S.Ct. 1472, 12 L.Ed. 2d 632, where the Court held that the fact that a challenged legislative apportionment plan was approved by a popular vote of the people is without significance if the plan adopted fails to satisfy the requirements of the Equal Protection Clause.

A declaratory judgment will be entered to the effect that so much of Article V, Section I, Paragraph IV of the Georgia Constitution which authorizes and requires the election of the Governor by the General Assembly under the circumstances here presented is unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> ". . . but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

A judgment accordingly may be presented by counsel for plaintiffs, after notice to counsel for defendant, for entry. A stay will be granted for a period of ten (10) days after the entry of the order, within which time the defendant may seek an additional stay from the Supreme Court of

the United States. The Court will retain jurisdiction for such other and further proceedings as may be deemed equitable and just.

This the 17th day of November, 1966.

/s/ Elbert P. Tuttle
ELBERT P. TUTTLE
United States Circuit Judge

/s/ Griffin B. Bell
GRIFFIN B. BELL
United States Circuit Judge

/s/ Lewis R. Morgan
LEWIS R. MORGAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 10533

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated,

Plaintiffs,

VS.

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such,

Defendant.

Civil Action No. 10546

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BYRAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, AND EVERETT WILLIAMS,

Plaintiffs,

VS.

BEN W. FORTSON, JR., individually, and as Secretary of State of Georgia,

Defendant.

Order

The Court having heard oral argument on November 11, 1966, and being advised in the premises, it is now

ORDERED, ADJUDGED AND DECREED as follows:

1. Those portions of Article V, Section I, Paragraph IV of the Georgia Constitution (Georgia Code Section 2-3004), which authorize and require the election of the Governor of

Georgia by the General Assembly, are hereby declared unconstitutional and void. The specific language declared unconstitutional and void is as follows:

> ". . . but, if no person shall have such majority then from the two persons having the highest number of votes who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

2. The Defendant, BEN W. FORTSON, individually and in his capacity as Secretary of State of Georgia, and all persons having actual notice of this Order, are hereby restrained and enjoined from seeking to cause the election of the Governor of Georgia by the members of the General Assembly.

3. This order is hereby stayed until November 28, 1966, in order to permit the defendant to seek an additional stay of this order from the Supreme Court of the United States.

4. This Court hereby retains jurisdiction to enter such other and further orders as may be required to further implement and effectuate the provisions of this decree.

This 17th day of November, 1966.

/s/ Elbert P. Tuttle
ELBERT P. TUTTLE
United States Circuit Judge

/s/ Griffin B. Bell
GRIFFIN P. BELL
United States Circuit Judge

/s/ Lewis R. Morgan
LEWIS R. MORGAN
United States District Judge

APPENDIX B

Motion for Preliminary Injunction (With Exhibits A, B, and C Thereto Attached) Filed by Appellees John Morris and Florence Robin in the United States District Court for the Northern District of Georgia on November 15, 1966.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

Civil Action No. 10533

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated,
Plaintiffs,

vs.

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such,
Defendant.

Motion for Preliminary Injunction

Upon the complaint heretofore filed herein and the exhibits attached hereto, the plaintiffs move the Court to issue a preliminary injunction ordering the defendant to call a special election under the terms and provisions of the Georgia Election Code and more particularly Section 34-1515 thereof.

(I) The grounds of this Motion, as more fully set forth in the Complaint and the exhibits attached hereto are that:

(a) The General Election of November 8, 1966, resulted in a failure of election in that neither of the two candidates for election to the office of Governor received a majority of the whole number of votes cast.

(b) Although a notice of intention to write in the name of Ellis Arnall was filed with the defendant and was published in a daily newspaper of general circulation in Georgia, Mr. Arnall in no way encouraged or discouraged that movement and his name was not listed on the ballot in the general election.

(c) The Georgia General Election of November 8, 1966, was conducted under and pursuant to the Constitution of the State of Georgia of 1945 and Section 2-3004 of said Constitution.

That provision of the Constitution of the State of Georgia of 1945 required that, in the event no candidate for Governor received a majority of the whole number of votes cast the Governor was to be elected by members of the General Assembly of Georgia.

On the 21st day of October, 1966, the defendant received from the Attorney General of Georgia a written and official opinion which declared, in part, as follows:

> (4) The last question posed was: "Is the provision of Code Section 34-1514, providing for a runoff election, in instances where no candidate receives a majority of the votes cast, on the fourteenth day after the day of the holding of the election, authorized by the provisions of Article V, Section I, Paragraph II, of the Constitution, which permits the General Assembly to fix the date on which the election of the Governor shall take place?" Article V, Section I, Paragraph II, of the Georgia Constitution of 1945, provided that the first election for Governor under the Constitution would be held on Tuesday after the first Monday in November of 1946, and that an election should take place every four years thereafter, on said date, until another date be fixed by the General Assembly. The Georgia Election Code enacted in 1964 made no change in the date of the November election for the office of Governor. See Code Section 34-802. Code Section 84-1514, relied upon by those who propounded the question to you, relates to a "runoff election".
>
> Moreover, Paragraphs III and IV of Section I of Article V of the Constitution are specific as to the transmission of the returns for the election of Governor and as to what happens in the event no person receives a

majority of the votes cast for Governor. Although the *unofficial* results of an election are made known, via the news media, shortly after the close of the polls, the Constitution provides that the official returns for the election of the Governor shall be sealed up by the managers, addressed to the President of the Senate and Speaker of the House of Representatives, and transmitted to you, and that you, without opening said returns, shall lay them before the Senate on the day after the two Houses shall have been organized. Those returns are to be opened and published before a joint session of the General Assembly and if no person shall have a majority, "then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election . . . the General Assembly shall immediately, elect a Governor viva voce" by a majority of the members present.

Therefore, any construction of Code Section 34-1514 as an effort to change the date on which the election of the Governor occurs, would contravene the specific provisions of Paragraphs III and IV, Section I, Article V, of the Georgia Constitution. Thus, it is my official opinion that the answer to the fourth question should be "no."

Very truly yours,

[s/] ARTHUR K. BOLTON
Attorney General

Through the newspapers of Georgia (and radio and television) in thousands of articles prior to November 8, 1966, the voters of Georgia were informed that in the event that no person in life received a majority of the whole number of votes cast, the Governor would be elected by the General Assembly of Georgia. In Exhibit A hereto attached are found some of the clippings from Atlanta's daily newspapers so advising the Georgia electorate. Many hundreds

of comparable articles and editorials appeared in Georgia's daily and weekly newspapers prior to the November 8, 1966, general election.

Thus the general election for Governor of November 8, 1966, was held under a total misapprehension on the part of voters of what, in fact, the law was and the voters in reliance upon the Constitution of the State of Georgia as interpreted by the State acting through its officials were deprived of their right to decide who was to serve them as Governor until the year 1971 on a free and fair basis.

(d) Although the provisions of Section 34-1514 of the Georgia Election Code provide for a runoff election, the people of Georgia were advised prior to the November 8, 1966, general election that that provision of law was not constitutional and that election was held on the basis of its unconstitutionality. For this Court to order a runoff election on a date certain under the provisions of Section 34-1514 of the Georgia Election Code and bar write-in voting in such election would:

1. Deprive the voters of Georgia of their right to reject the nominees of both major political parties in Georgia and, thereby, of their right to vote;
2. Deprive the voters of Georgia of their right under the laws and Constitution of the State of Georgia to vote for whomever they please by write-in ballot, an inherent right of suffrage;

3. Result in this Court's selecting the persons for whom the people of Georgia might vote when, in fact and in law, no judgment as to who the candidates in a run-off election should be was made, since the election was conducted under and by virtue of a state constitutional provision of which the electorate of Georgia was aware and upon which it relied but which was, in law and in fact, invalid;

4. Result in fact in the ex post facto nomination by a Court of the United States of the persons for whom the citizens of Georgia might vote;

5. Deprive minority political parties and groups and independent candidates of their right of access to the ballot;

all of which is in violation of the right of plaintiffs to vote and have their votes counted as guaranteed them by Article IV, Section 4 and by the equal protection and due process clauses of the Fourteenth Amendment and of the Fifteenth Amendment of the Constitution of the United States, and further deprive them of their right to dissent and petition for a redress of grievances as guaranteed by the First Amendment of said Constitution.

(e) Additionally plaintiffs are informed and believe and based upon such information and belief aver that in the event a special election were called, the reasons for a write-in campaign would no longer exist and the probability of the present factual situation's recurrence is infinitesimal. In the 1966 Democratic Primary runoff election, plaintiffs are informed and believe and based upon such information and belief aver that Republican voters crossed over and voted in the Democratic Primary runoff election in an effort to nominate Lester Maddox as the Democratic nominee for Governor, this process resulting in the nomination for Governor of a Goldwater Democrat by the Democratic Party of Georgia and a Goldwater Republican by the Republican Party of Georgia, and, in fact, providing Republican voters with disproportionate strength in the electoral process, they being afforded the opportunity of selecting the gubernatorial nominee of the Democratic Party in the Democratic primary and the nominee of the Republican Party of the State of Georgia by other means. See Exhibit B attached hereto and made a part hereof.

Plaintiffs are further informed and believe and based upon such information and belief aver that it was this basic unfairness—one man, two votes for members of the Republican party—that resulted in write-in votes for Ellis Arnall and others for Governor. A special election with a runoff election therefrom would cure the basic unfairness of the nominating processes of Georgia and the reason for a large number of write-in ballots would not be present in any post special election runoff.

2. In another case in this court (*Morris, et al.* v. *Fortson, et al.*, Civil Action No. 10483) this Court entered an order declaring statutes limiting assistance to illiterate voters unconstitutional, and retaining jurisdiction for the purpose of counting write-in votes. In that case, in open court and in good faith, attorneys representing the State Election Board of the State of Georgia and the Ordinaries of the State of Georgia stipulated that in those counties utilizing Votomatic machines, all voters would be provided with write-in envelopes into which data processing cards were to be inserted prior to depositing of ballots in ballot boxes.

Plaintiffs are informed and believe and based upon such information and belief aver that literally hundreds of complaints over election procedures have been made and filed with Write-In Georgia, a campaign organization which requested that write-in votes be cast for Ellis Arnall. Those complaints are presently being analyzed and investigated.

Plaintiffs further understand that attorneys for members of the affected class, affiliated with the write-in movement, intend to move this court to count write-in ballots not counted or disallowed for spelling, the number of which is estimated to be in the tens of thousands and to disallow data processing card ballots which were not enclosed in envelopes from being counted, since envelopes not containing data processing cards were not counted. Additionally according to press reports the data processing machines in DeKalb County broke down and destroyed hundreds of

ballots. Due to election irregularities and alleged violation of this Court's orders by state election officials, a final determination of the number of votes cast for any person in the General Election of November 8, 1966, cannot be made until this Court hears and determines election questions under its order of November 1, 1966, retaining jurisdiction of that case for the purpose of issuing any and all additional orders that may become necessary or appropriate in order to effectuate the judgment of the court and for such other and further proceedings as are deemed appropriate in connection with the general election of November 8, 1966, having to do with the tabulation of write-in ballots cast.

(3) Additionally, plaintiffs are informed and believe and based upon such information and belief aver that, in certain Georgia counties voting was held on a racially segregated basis and Negro illiterates were deprived of the right of assistance in violation of this Court's prior order. It is understood that based upon these facts attorneys for members of the affected class affiliated with the write-in movement, may move for contempt citations of one or more of the Ordinaries of Georgia. (Regarding election irregularities, see Exhibit C attached hereto.)

(4) The plaintiffs and the class they represent are guaranteed a republican form of government by Article IV, Section 4 of the Constitution of the United States, the right of dissent and petition for a redress of grievances by the First Amendment of said Constitution and the due process and equal protection clauses of the Fourteenth Amendment of said Constitution, and they are provided by the laws of the United States with the remedies for their deprivation, which remedies they seek to enforce in this Court.

(5) A runoff election under the provisions of Section 34-1514 of the Georgia Election Code will not cure the failure of election of Governor occurring on November 8, 1966, and Section 34-1515 becomes automatically applicable.

(6) No injury will be sustained by the defendants or by the public through the issuance of a preliminary injunction.

(7) The Constitution of the State of Georgia of 1945 provides for the incumbent Governor of the State of Georgia to remain in office until his successor is chosen.

(8) The issuance of a preliminary injunction as prayed for herein will not cause undue inconvenience or loss to defendants, but will prevent irreparable injury to the plaintiffs and members of the plaintiffs' class.

(9) This is the second application for extraordinary process in this cause.

WHEREFORE, PREMISES CONSIDERED, plaintiffs respectfully pray that this Court take jurisdiction of this matter, that, under Rule 65 of the Federal Rules of Civil Procedure, this Court issue a preliminary injunction to be later made permanent against the defendant herein.

Respectfully submitted,

s/ Charles Morgan, Jr.
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Exhibit A to Motion for Preliminary Injunction

10/3/66

WRITE-IN NEVER WON STATE, BUT THURMOND SWEPT S.C.

By Achsah Nesmith

Since the result of the Democratic primary runoff came Wednesday several prominent Democrats have mentioned the possibility of a write-in campaign.

According to Secretary of State Ben Fortson no statewide office in Georgia has ever been won by a write-in candidate, but then no one had ever been elected to one in South Carolina until 1954, when Sen. Strom Thurmond became the first man ever to win a seat in either house of Congress on a write-in vote. Some local and county-wide offices have been won on write-in campaigns.

State election laws provide that citizens must be given an opportunity to write in the name of any person they desire for any office in a general election. Write-ins are not legal in primaries.

Where paper ballots are used, the procedure is simple. Space must be allowed for a write-in candidate, and the voter puts in the name of the office and the name of the person he wishes to vote for.

When machines or votomatics are used, cards must be provided for voters for that purpose, Fortson said.

Runoff Possible

Further, state law requires a clear majority to win election for governor, and if a write-in candidate should cause a split between three candidates, with no clear majority, there would be a runoff election.

Thus, it is possible and it has been done, but Sen. Thurmond is alone in his class. The difficulties of mounting a write-in campaign are great and there are dangers.

It would take a great deal of money, for one thing. Candidates find it difficult enough to get elected with their names on the ballot. Where paper ballots are used in addition to machine or votomatic ballots because of last-minute changes in the line-up, voting tends to fall off and the possibility for pool-worker error is great.

With voters having to work it out on their own, the difficulties would increase. If a voter simply put down a last name, the ballot wouldn't count, Fortson said, since it could conceivably mean anyone with that last name. As long as a name was written so that it would normally be assumed to mean the person, it would count, he added. For instance, a voter who wrote in "Bo Callaway" would be assumed to mean Rep. Howard (Bo) Callaway.

But voters who spell poorly and/or write illegibly would create problems.

Stay At Homes

In addition, voters who don't like either candidate in a race tend to just stay home. Getting people out to vote is obviously a difficult task in the best of times, and frequently less than half the registered voters ever come near the polls.

Although Georgia Democratic gubernatorial candidates have been unopposed on the general election ballot for generations, no one has worked up an effective write-in campaign against any of them, no matter how bitter the campaign for the nomination.

Sen. Thurmond was running for a seat vacated by the death of Burnet Maybank on Sept. 1, two days before the Democratic party was to certify him as primary nominee —there was some question as to whether this was required on that date or not—and the state executive committee voted to nominate a successor in convention.

There having been no Republican opposition for a state race in South Carolina since Reconstruction, Thurmond

based his campaign on the right of the people—not a committee—to choose their governor.

It produced the largest general election turn-out in the history of the state, with a few hundred write-in votes for a third candidate, and Thurmond swamping the convention nominee—Edgar A. Brown.

Atlanta Daily World, October 7, 1966

WRITE-IN EFFORTS AID MADDOX

There can be no question that the winning of the Democrat nomination for governor by candidate Lester Maddox, an extremist on the race issue, is one of the biggest political surprises and shocks in the history of the state.

Another big shock hurt the members of our racial group when the Rev. M. L. King, Sr., suggested before a largely white audience in Atlanta that Sen. Herman Talmadge "is the only man who can save the state." From reports we've received, the liberal white group who had assembled to consider the question of a write-in candidate for governor, before whom the Rev. King spoke, was also shocked by the King suggestion of Sen. Talmadge.

We can sincerely sympathize with the moderate Democrats (white and black) because the Maddox nomination put them in a strait-jacket, so to speak.

But there is no reason or logic to their efforts to even consider a write-in campaign for anyone for governor. We must face the prospect that either Howard Callaway or nominee Lester Maddox will be elected governor of Georgia Nov. 8th.

A write-in vote will have the effect of aiding nominee Maddox. We urge our readers to have nothing to do with any write-in effort, and try to discourage others from supporting it.

We hope our political leaders will ask our white friends to refuse to help nominee Maddox by becoming a party to any write-in effort.

Atlanta Daily World, October 2, 1966

WRITE-IN PLAN AIDS MADDOX

A number of our leaders have adequately pointed out the fallacy and danger in a write-in vote for governor in the November 8th election. Likewise, a number of public officials such as Governor Carl Sanders and Alderman Everett Millican and Alderman Q. V. Williamson have pointed out the futility of such efforts.

We recognize that the emergence of nominee Lester Maddox, an extremist on the race question, puts the moderate white democrat in an embarrassing position and the Negro democrat in an almost impossible dilemma.

But we think the time has come for men to put conscience and conviction above party loyalty.

The situation confronting the voters is simply one which asks: Do you want Lester Maddox to be governor or do you want Congressman Howard Callaway to be governor?

One of these two men will become governor regardless of the effects of the write-in campaign. But we hasten to remind our readers that the unanimous opinion of those familiar with politics is that the write-in vote will have the effect of aiding Democrat nominee Maddox.

It is also conceded that the vote in November will be close between the two nominees—Maddox and Callaway. Therefore, regardless of the size of the write-in vote, there is danger of neither nominee receiving a majority of the votes. In this event the election of governor goes to the legislature. There are only about 20 Republicans out of

205 in the State House, so it does not take much imagination to see that it would elect Democrat Maddox.

The Negro voters of the state did all they could to make candidate Ellis Arnall the Democrat nominee. Now, we think our leaders could logically ask former Gov. Arnall and the leaders of the write-in campaign in his behalf to stop the effort because it is only aiding nominee Maddox to the governorship.

But regardless of what others do, we urge our people to stand together in unity again racial extremism.

Atlanta Constitution, October 4, 1966

NOVEMBER RUNOFF CLEARLY FORBIDDEN

Even if there were a write-in candidate for governor in the Nov. 8 general election, there would be no possibility of a runoff.

The state constitution makes this clear.

There has been considerable speculation about a write-in candidate with the idea that he might be able to get into a run-off with either Democratic nominee Lester Maddox or Republican nominee Howard (Bo) Callaway.

Secretary of State Ben Fortson and other officials pointed out Monday that while the state election code indicates the possibility of a runoff in the general election, the state constitution makes it clear that no runoff may be held even if a candidate fails to get a majority of the votes.

Fortson said there was no doubt in his mind that the constitution would take precedence over the election code and that Atty. Gen. Arthur Bolton would so rule if called upon for an official opinion.

Article 5 of the state constitution provides that the results of the general election be sealed up and that they later be turned over to the Senate and House of Representatives.

The results are then opened up during a joint session of the legislative bodies.

If no one has a majority of the votes, the state constitution provides that "from the two persons having the highest number of votes . . . the general assembly shall immediately elect a governor viva voce (voice vote)."

A majority of the legislators present would be needed to elect the governor under such circumstances.

Atlanta Daily World, October 5, 1966

PLAY WITH FIRE

First, we wish to remind our readers that our race confronts the most crucial time in our states history during the last 100 years. We urge them to read and listen carefully to every development between now and Nov. 8th.

The Georgia Democrats are confronted with a problem in Fulton County to find a replacement for Cong. Charles Weltner who withdrew as a candidate for the Fifth Congressional District position rather than support nominee Lester Maddox for governor. Any replacement will have the effect of supporting nominee Maddox.

Therefore, it is with surprise that we read and hear reports that State Senator Leroy Johnson has projected his name for consideration as a replacement for Congressman Weltner. If Mr. Weltner declined to run, and we commend his act of high principle, how can Senator Johnson enter his name for consideration?

We recall soon after the runoff primary, Senator Johnson suggested that the voters go fishing on Nov. 8th. This is comparable to a neighbor suggesting that his neighbor go fishing while the neighbors house is on fire.

We have also heard suggestions that a write-in candidate be tried.

There is a two-man contest for governor and any write-in candidate will have the effect of aiding Mr. Maddox.

We deplore all these suggestions which will only complicate a crucial situation.

This is a time for deliberate, calm and responsible action. This is not a presidential election, where the party issue should be considered. It is only a state election with the governorship the main prize.

Atlanta Daily World, October 26, 1966

DOOMED DRIVE

(From The Macon News)

A group of political pied pipers is attempting to siphon off votes from Callaway and Maddox by encouraging a write-in campaign for Ellis Arnall.

A write-in drive would be an exercise in futility, a doomed-from-the-start throwaway of votes which would benefit Maddox and harm Callaway.

This newspaper vigorously supported Arnall. But it is crystal-clear he cannot be elected governor. The choice is between Maddox and Callaway and the quicker this is realized the better.

Atlanta Journal, October 7, 1966

WRITE-IN ATTACKED

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of some "write-in" votes he was supposed to have gotten in his native Telfair County. Some of these, it was disclosed later, were of a transparent nature.

This occurred when Mr. Talmadge's father, the late Eugene Talmadge died, after winning the Democratic nomi-

nation. The Georgia Supreme Court overruled the action of the House members and named M. E. Thompson acting governor.

Alderman G. Everett Millican, who also is a former state senator, said he thought "it would be a great mistake for us to have a write-in campaign." He added:

"In the first place, it couldn't be successful. The next thing is: the people have two candidates to vote for for-governor—one Democratic, one Republican.

"If they don't want one of these, they've got the choice of the other, and they ought to take it. Because, generally speaking, if you write-in in order to beat one candidate, what you really do is give that candidate a better chance to be elected."

Mr. Millican said also that there was a possibility a write-in campaign could force the decision into the House of Representatives.

"I don't think the possibility is great," he said, "but if that happened, it would be a mistake. I think it would be wrong for anybody but the people to select our governor."

Comments from the two men got a rebuttal, however, from James O'Hear Sanders, a sponsor for a write-in movement in behalf of former Gov. Ellis Arnall.

"Anyone who thinks of the write-in campaign for Gov. Ellis Arnall has no chance of victory had badly misread the determination of hundreds of thousands of aroused Georgians who cannot accept either Lester Maddox or Howard "Bo" Callaway," he said.

"Following a brief announcement of the start of the write-in campaign," said Mr. Sanders, "more than 50 persons attended a spontaneous rally at the Georgian Terrace Hotel. These 500 delivered a mandate to their elected steering committee—that mandate being to forge ahead with a campaign to elect Ellis Arnall.

"Since that rally, committees have been established, fund-raising has begun, and we have seen the marshaling of support for the write-in campaign by other groups—the Fulton County Democratic Executive Committee, the Young Democrats Club, and Young Democrats organizations at Morehouse College, Emory University and Georgia State College."

"At 3 P.M., Sunday," added Mr. Sanders, "there will be a state-wide rally of Arnall supporters in the ballroom of the Atlanta Biltmore Hotel, and a college students' parade, with participants from all over Georgia, is scheduled in Atlanta on Wednesday."

Meanwhile, the Fulton Atlanta County Democratic party urged its members Thursday night to write in a candidate for governor in the Nov. 8 general election as a slap at the party's nominee, segregationist Lester Maddox.

A statement issued by the party's executive committee said Maddox did not stand for the platform and "therefore the party cannot accept Mr. Maddox."

The party left the choice of write-in candidate to the voters.

The action brought quick response from Maddox, who has lost the support of several Democratic factions since defeating Ellis Arnall in the primary runoff.

"I have never seen such bitterness before when I have lost," he said. "I think it's time all Democrats, whether spelled with a big D, little D or middle-sized D closed ranks now that they have a mandate from the people."

Jack Turner, head of the Fulton County group, said the statement meant Fulton County Democrats could not support either Maddox or Republican Howard (Bo) Callaway.

The Young Democrats Club executive committee passed a resolution to endorse a write-in campaign for former Gov. Ellis Arnall, beaten in the runoff by Maddox.

In addition Young Democrats at Morehouse College, Emory and Georgia State endorsed write-in campaigns for Arnall. The Georgia State group switched from Jimmy Carter.

These new groups join ranks with another group of about 400 who met Wednesday night in Atlanta and chose to back Arnall as a write-in in November. Arnall is the only defeated primary candidate to announce he would not oppose a write-in campaign.

A few persons at the Fulton Democratic meeting of about 200 protested a write-in because they felt it might help the election of Callaway.

The Atlanta Constitution, October 10, 1966

POLITICS AND PEOPLE

ANTI-MADDOX VOTERS FACED WITH 2 CHOICES

By SAM HOPKINS
Constitution Political Editor

There are two schools of thought among anti-Lester Maddox voters as to how he can best be kept out of the governor's chair:

1. Go all out for Republican Howard (Bo) Callaway.

2. Work up a massive write-in vote for someone with the hope he will run second in the Nov. 8 election.

One high-ranking Democratic official said privately Friday that at this point he would have to go the first route.

"A write-in would be the most stupid thing in the world," he said. "It would definitely give Lester the election."

Comment and Analysis

It was his opinion that even if former Gov. Ellis Arnall, who is being mentioned most prominently as the person around whom a write-in campaign would be built, ran second to Maddox the General Assembly would not elect him.

If there were no write-in vote and all those who dislike the idea of Maddox as governor voted for Callaway, the contest likely would be close, with Maddox probably having the edge at this time.

And it seems clear that if there is an unorganized, haphazard write-in for one or more candidates it might well assure Maddox's victory.

But apparently the move to organize a write-in campaign for Arnall is catching on faster than most people ever imagined it would, not only in Atlanta but in other parts of the state.

Maddox defeated Arnall in the Sept. 28 Democratic run off 443,055 votes to 373,004.

Some of the supporters of an Arnall write-in believe that even if a million voters turned out in the November election, Arnall could get fewer votes than he did in the primary runoff and still run second in the race, and keep either Maddox or Callaway from getting a majority of the votes.

In such an event, a joint session of the House and Senate in January would elect a governor from either of the two candidates who ran first and second.

It is the feeling of many observers that if Arnall ran second with a write-in vote the front-runner would be Maddox.

This would be an ironic political development inasmuch as Callaway was considered such a strong front-runner prior to Maddox's victory in the runoff with Arnall.

The Maddox balloon seemed to soar after his nomination when high-level Democratic leaders suddenly swung their support to him.

Many of the Arnall write-in advocates admit that if the legislators had to decide today between Maddox and Arnall as governor they would elect Maddox.

However, they feel that the period between the Nov. 8 election and the opening of the January session of the legislature would allow time to change the minds of individual legislators.

This has been one of the strangest political years in Georgia's history, and there still could be some surprises before it's all over.

Atlanta Constitution, October 10, 1966

CLOSE-UP

HOW'S THAT AGAIN? APATHY?

What was that about apathy toward the governor's race?

At one point, the likeliest explanation seemed to be that most people had made up their minds to vote for Bo Callaway anyway, so it didn't matter much who won the Democratic nomination.

But now I wonder whether it wasn't some intuitive sense among Georgia voters, like birds who can detect an early fall. It could be that the voters sensed things would get so intense about October that they played it cool earlier just to survive.

Instead of the usual one-man November race, it now appears we will have three. For the Ellis Arnall write-in campaign, which Bo Callaway could have headed off if he had moved quickly enough to the center, now seems to be for real.

Any write-in—even a small one—is bad news for Mr. Callaway. As he said last week, he needs Democratic votes to win.

The arithmetic is simple enough to understand. Until Barry Goldwater charmed the so-called Mad Democrats, the highest tally any Republic candidate ever had posted in Georgia was the 274,472 votes Richard Nixon took in 1960—and that was only 37.5 per cent of the total.

So 275,000 is as good a calculation as any for the Republican base vote. Of course it includes some Negro vote, which used to go heavily Republican but doesn't now. And it included an unmeasured anti-Catholic vote.

Lester Maddox in the recent runoff won with 430,420 votes. But by conservative estimate, 75,000 Callaway supporters naively crossed over to vote for Mr. Maddox in the mistaken belief he would be a pushover in November. That leaves a Maddox base vote of 355,000.

Ellis Arnall took 360,021 in the runoff. It would be foolish to believe that even a superbly organized write-in campaign can recapture all of them. But even a third could drastically affect the outcome.

Bo Callaway should be out beating the drums and sounding the klaxon to convince Arnall Democrats that a write-in would help Maddox. Some Arnall voters already have concluded that for themselves. Others are so bitter over the crossover maneuver that they are willing to let Maddox win.

Bo should be concentrating on the rest. He can't just say Lester is bad. He has to explain how he is better. So far he hasn't.

Meanwhile, that once-cold kettle is whistling now.—BRUCE GALPHIN.

Atlanta Constitution, October 10, 1966

CHANTING GEORGIA MODERATES LINE UP FOR ARNALL WRITE-IN

By Duane Riner

"I don't want no racist governor,
I don't want no company man;
All I want is Ellis Arnall
And I'll elect him if I can."

Shouting, singing, placard-waving Georgia moderates mobilized for a state-wide write-in campaign for Ellis Arnall here Sunday with a demonstration that would have been the envy of Arnall before he was bumped in the runoff. The two surviving gubernatorial candidates would have enjoyed it also.

A standing-room-only crowd estimated by "Write-in, Georgia" officials at 1,000 overflowed a Biltmore Hotel ballroom into a corridor as speaker after speaker gave assurances that a Nov. 8 write-in could be effective enough to keep Democratic nominee Lester Maddox or his Republican opponent Rep. Howard H. (Bo) Callaway, from getting a majority of votes.

Failure of one of the two nominees to win a clearcut majority would throw the election into the General Assembly for a decision between the top two vote-getters.

Charges that 75,000 to 100,000 Callaway supporters cast runoff ballots for Maddox with the thought that he would be an easier opponent to defeat in the general election were reiterated in speech and song. In one parody, led by two folk singers equipped with guitar and banjo, Callaway is quoted as pleading:

"Oh, Mr. Maddox! Oh, Mr. Maddox! Can I please have back the votes I lent to you? Now the runoff's in your sack, I would really like my Republicans back, or I really don't know what I'm going to do."

Gainesville newspaper publisher Sylvan Meyer termed it "very important for a substan- Continued on Page 6, Column 2

Atlanta Journal, October 12, 1966

THE RESTLESS MODERATES

THE RESTLESSNESS of disgusted Georgia moderates continues to be one of the most important aspects of the race for governor. The fact that we are seeing restlessness and not passivity is in itself hopeful.

In no recent Georgia election has there been so much noise about the lack of a happy choice for moderate-thinking people.

In the kind of expression of principle that rarely is seen in politics, an effective and much-admired young congressman has withdrawn from the race for reelection rather than support the Democratic gubernatorial nominee, Lester Maddox.

Others of the Democratic party, candidates and members of party executive committees, have moved individually to make it clear that they do not support Maddox or condone what he symbolizes.

The Fulton County Democratic party organization broke all precedent by emphatically rejecting the Democratic nominee for governor, as well as the Republican candidate.

The write-in movement has grown, and moves are afoot to establish a new organization to speak for Georgia Democrats who cannot accept Lester Maddox.

In short, many people in Georgia are not taking this situation in dejection, with withdrawal from the fight for the future of a state that had been making great strides. They mean to be heard. They mean to fight. They do not want anyone, here or elsewhere, to think this is a state

where Lester Maddox and Bo Callaway represent the only two great bodies of public sentiment.

Their determination and concern for their state are praiseworthy.

But the main question for them now is how best to make their weight felt. There are disagreements about this, mainly revolving around write-in talk.

There is not much disagreement, actually, about which of the two official candidates is the more responsible. Most of those who now are actively expressing their disgust would vote for Mr. Callaway if they had to choose between the two on the ballot. But some dislike his public record so much that they are willing to damage his chance, through the write-in movement, and help elect Mr. Maddox. That is the main import of the write-in campaign.

So far Mr. Callaway seems oblivious of the meaning of this whole development; he offers little to reassure the moderates about what kind of governor he would be.

The write-in effort, if it gained strength, would take votes away from Callaway. And if it had the extraordinary and unlikely success of throwing the election into the Georgia Legislature by depriving either official candidate of a majority, Mr. Maddox probably would be given a second shot at the governorship if he had trailed Mr. Callaway in the returns.

This is the point which should be considered long and well by those pondering the write-in.

A logical objective for moderate-thinking Georgians at this point would be the formation, perhaps after the election, of a new and unofficial Democratic force in Georgia. By renouncing the leadership of the man who technically will be at the head of the Georgia Democratic party for the next four years no matter how the election goes, this new

organization could show that Georgia moderates are numerous and determined to be the future. In time it could emerge as the Democratic party in this state.

The write-in effort is much less likely to have a lasting good impact of that kind.

Atlanta Constitution, October 14, 1966

RIVAL JEOPARDIZES JOBS, CALLAWAY TELLS STUDENTS

By Sam Hopkins
Constitution Political Editor

Albany—Republican Howard (Bo)Callaway told Albany Junior College students here Wednesday that Lester Maddox as governor would give Georgia "four years of an image that will keep you from job opportunities."

Maddox's opponent reminded them that "in any other year in Georgia's history Lester Maddox would be your gov-

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Callaway receives endorsement of Atlanta banker William R. Bowdoin and Negro Baptist agency. Story on Page 3.

ernor," but that with a GOP candidate there will be a two-party race in the Nov. 8 election.

With no Republican running in the past, the Democratic nominee automatically became governor.

Callaway continued to stress the difference between himself and Maddox in experience, approach to problems such as school guidelines and in the type of persons surrounding each. He said this political year (Continued on Page 8, Column 1) may present "the greatest difference (in candidates) we've ever offered to Georgians."

The Republican cited his 12 years on the State Board of Regents, his state Chamber of Commerce and congressional work as compared with Maddox, who "never had a single day of local, state or national experience" in government.

Callaway also said that while he was trying to soothe racial feelings in Americus and worked "responsibly" for changes in the school guidelines in Congress, Maddox attended a Ku Klux Klan rally and passed out ax handles in Americus. He said Maddox wants an "open confrontation" with the federal government over the schools.

Callaway made several speeches in Albany and Leesburg during the day and evening and shook hundreds of hands during shift changes at local mills.

He defended his vote against the minimum wage bill before Congress and pointed out that Georgia's 10 congressmen split 5-5 on the vote.

Inflation Fear

Callaway contended the wage bill would "create inflation faster than you believe" and would take away from the unskilled laborer his "chance of getting a job." He said the Wall Street Journal reported that the "entire purpose of the minimum wage bill was to keep industry from moving south."

In response to a question, the GOP standardbearer said that he believed a Republican governor during a Democratic administration in Washington would result in Georgia's getting more federal funds.

"If Georgia goes Republican," he said, "I promise you the South shall rise again. We'll have our fair share" of federal funds.

In a speech to the Albany Rotary Club, Callaway said there was no doubt that he had "definitely lost ground" in the governor's race since Maddox won the Democratic

nomination Sept. 28, but although it is "still a horse race," he is confident of victory.

However, he added that the "one thing that could elect Lester Maddox is the write-in vote. I am extremely concerned about it.

ARNALL DRIVE

A drive is under way for a write-in campaign for former Gov. Ellis Arnall, whom Maddox beat in the primary runoff.

Callaway seemed somewhat speechless at the Rotary meeting over a gift presented to him.

President Woody Kirksey explained that inasmuch as Callaway had been described by some people as similar to Abraham Lincoln—a GOP president—he might need some sort of tool for splitting rails, one of Abe's reported activities.

But the only thing that could be found on short notice, Kirksey said, was an ax without the head.

And as the Rotarians roared, the Republican candidate stood there momentarily holding and staring at an ax handle.

The Atlanta Journal, October 21, 1966

CALLAWAY SAYS FOE FRIGHTENS INDUSTRY

BY STEVE BALL, JR.

Howard (BO) Callaway said "industry presidents" say major industries are refusing to make final decisions about moving to Georgia until they are sure Lester Maddox won't be elected.

The Republican candidate for governor, addressing the Atlanta Life Insurance Underwriters Association at a Thursday luncheon, declared Mr. Maddox, his Democratic

opponent, has gotten publicity of the sort "your companies wouldn't want to buy in a million years."

The Maddox candidacy "is costing us dearly already," Rep. Callaway charged.

"Industrial development people and industry presidents are telling me that major industries today are waiting to make a final decision about coming to Georgia until they are certain my opponent won't be elected," he elaborated.

Rep. Callaway, who received an enthusiastic reception from the underwriters, also accused Mr. Maddox of attempting "magic" in his promises about money.

THE GOP hopeful said Mr. Maddox has pledged $140 million more for cities over four years, $60 million more for counties over four years and another $200 million for a teachers' pay raise.

"And now I find . . . he has also promised a tax reduction which would virtually sabotage the teachers' pay raise . . . by taking almost $50 million out of the general fund," Rep. Callaway said.

He explained that one of the state petroleum groups claims Mr. Maddox has promised to take the seven-tenths of a cent per gallon sales tax on gasoline.

"In other words, in separate promises he pledges no tax increase and a tax decrease and then promises programs that will cause a tax increase," Rep. Callaway declared.

"What kind of magic is that? It sounds like he's running for Houdini instead of governor."

In a question-and-answer session after his talk, Rep. Callaway strongly hinted that Georgia's schools might be closed with Mr. Maddox as governor despite Mr. Maddox' "apparently sincere" pledge not to close schools.

Gov. George Wallace of Alabama, with "years of experience," keeps Alabama extremely close to martial law all the time, he said.

"CAN YOU imagine what might happen under a man with no experience?" he wondered aloud.

"Unless you go at it (opposing the federal government) in a very responsible way, it would be possible to end up with our schools closed."

To a question about the write-in campaign for Ellis Arnall, Rep. Callaway, while being extremely careful not to offend the "dedicated people" behind the movement, said he thinks people will eventually become "resigned to the fact" that either he or Mr. Maddox is going to win and vote for the better qualified of the two.

He indicated he believes he would lose if it were up to the General Assembly to elect a governor.

Besides, he said, "it might be March or April until we know who the governor is and we've gone through two governors once."

Atlanta Constitution, October 21, 1966

LEGISLATURE COULD ELECT, SMITH HOLDS

By United Press International

Incoming Lt. Gov. George T. Smith said Thursday there was no doubt it would be legal for the legislature to elect a governor if a write-in movement prevents any one candidate from getting a clear majority of the votes.

A question has been raised of whether the legislature can legally select the governor in such a case because it is not yet fully reapportioned.

Smith said the courts had held that Georgia's legislature was legally apportioned as long as it became fully apportioned during this legislative session.

"We have to leave the matter in the hands of the court," Smith said, "and the court has ruled that the apportionment

of the House and the Senate is legal as long as we reapportion next year."

A group of moderate and liberal Democrats has formed a group to promote former Gov. Ellis Arnall as a write-in candidate. Arnall lost to Maddox in the Democratic primary runoff.

EDITORIALS *Atlanta Journal*

FEED A DEAD HORSE?

ON NOVEMBER 8 there is a general election in Georgia. As a result of the Democratic primary and runoff, one of the candidates is Lester Maddox of Atlanta.

Another candidate is the first Republican to run for the governorship in our time. He is Rep. Howard (Bo) Callaway of Pine Mountain.

Thus, the stage should be set for a contest between one candidate, duly selected by the rules of the Georgia Democratic party, and another whose name is on the ballot as the result of more than 100,000 signatures.

But there is a complication. We have a write-in movement by those who find nothing attractive in either candidate. They offer the name of ex-governor Ellis Arnall who was eliminated by Lester Maddox according to the rules under which the Democratic primary and run-off were held.

This is legal, and the sincerity of the backers of this movement is admirable, though wishful and wistful.

But the logic by which Mr. Arnall, having failed before, is to win this time, escapes us.

In view of the way the political forces of Georgia are disposed, it seems obvious that every write-in vote for Mr. Arnall will help Mr. Maddox.

This is the opinion of many, and Charles Pou, political editor of The Journal, quoted a good authority in his Sun-

day column. The authority is Jesse Hill of Atlanta, a top Negro businessman, and a forceful, quiet and effective worker for the good of this city. Mr. Hill sees no logic in the write-in. He sees help for Mr. Maddox coming from it.

"There are many dedicated Georgians involved, including some of my close associates. A close analysis of the write-in, however, clearly indicates that there is no genuine and effective political alliance possible," he said.

Like many others, Mr. Hill is unwilling to die for either candidate. But he does believe that there is a choice for the Negro voter between Mr. Maddox and Mr. Callaway "which would be in the interest of the rank and file citizens."

On November 8 we decide the course we take for the next four years.

We have two candidates and the difference between them gradually is becoming apparent. It should be obvious eventually to those who now argue that there is no difference.

We also have the write-in movement, an exercise in futility and a classic case of feeding hay to a dead horse.

Atlanta Constitution, October 27, 1966

EUGENE PATTERSON

TWO FOR THE TEXTBOOKS

The current campaign for governor is generating two sidelights that will interest political scientists for some time to come. The first concerns the sudden suspicion by Lester Maddox that he, not Howard Callaway, is being hurt by the write-in vote.

Maddox himself, and not simply his supporters, is so uneasy about it that he has made personal efforts to get

the write-in idea stopped—a development that must perplex Callaway.

For Callaway has felt those who write in a name may be moderate and Negro voters who would never vote for Maddox—and whose votes are therefore being subtracted from his own total.

Maddox fears otherwise. He apparently has come to believe that he is the one who will be hurt most, because many of those who engage in a write-in may be loyalist, party-lining Democrats who would never vote for a Republican.

Evidently he feels a substantial number of these brass-bound Democrats may write in the name of a Democrat other than Maddox, while still being able to say they've voted a straight Democratic ticket, and thus subtract votes from his total, since Callaway never would have gotten them.

Only a post-election analysis of the vote can show which of the two nominees had cause for his jumpiness. But it is a measure of the wildness of this unpredictable campaign that each is convinced the other one is being helped by the write-in.

The other development that will contribute to political science of the region is the agitation of raw class conflict in the campaign.

Always harmful in the American body politic, the division is being sharply opened by Mr. Maddox with his poor-against-rich attack. "I know what it is to struggle and do without . . . It's no fault of a millionaire he doesn't understand people . . . I know how to say no to a wife who wants a new dress . . . not inherit millions . . . We've got a few with dirt under their fingernails, thank God . . . (the Wall Street crowd) is trying to prove they can buy the office of governor."

This kind of thing is usually off-limits in our every-man-a-king society. Moderates usually make a studied effort to bridge the class gap, not widen it. Southern populism tried to pit class against class but at least it was consistant in that it spoke for economic liberalism and poor Negroes as well as whites. The peculiarity that will interest political scientists is that Maddox speaks for neither, yet assails in rawest class-war terms the very class he joins in embracing Goldwaterism. For the bedfellows of 1964, this is the morning after.

Atlanta Journal, October 30, 1966

NEGROES SAY SEN. JOHNSON TRYING TO GET MADDOX VOTES

By Wayne Kelley

Two Atlanta Negro leaders Saturday charged Negro State Sen. Leroy Johnson is playing "partisan politics" in an effort to aid Democratic gubernatorial nominee Lester Maddox.

Jesse Hill, an insurance company executive, and Alderman Q. V. Williamson made the assertions after a disputed endorsement of the Ellis Arnall write-in movement by the Atlanta Negro Voters League.

Sen. Johnson read the endorsement statement Friday after it was approved by a vote of 45-10. Mr. Williamson, co-chairman of the voters league, claimed the resolution was passed after a meeting of the executive committee had adjourned.

"It seems to me that Sen. Johnson is trying to mislead the Negroes in the city of Atlanta," the Negro alderman stated Saturday.

"He is trying to develop a method to get them to vote for Lester Maddox without them knowing they are doing it."

Mr. Hill said he thought "moderates and Negro leaders" ought to sit down with both Mr. Maddox and Republican candidate Howard (Bo) Callaway to obtain "guarantees" on issues of importance to poor Negroes and white citizens.

Sen. Johnson said Friday that the Negro community could not support either Rep. Callaway or Mr. Maddox. He was joined in issuing the prepared statement by Negro State Rep. Ben Brown and J. D. Grier Jr.

Backing this position Saturday was Rev. Samuel Williams, president of the Atlanta NAACP.

"I am 295 per cent in favor of the write-in campaign," the Rev. Mr. Williams commented. "I think that Georgia needs at this time the influence of a write-in vote."

As for the position taken by Mr. Hill and Alderman Williamson, "I want to accuse them of being the unwitting agents of Bo Callaway," the NAACP officials said.

The split in the Negro leadership over the write-in campaign has forced former allies into opposing camps.

Mr. Hill, who often sees eye-to-eye with Sen. Johnson, said "I think Leroy and the others ought to be honest about this write-in effort.

"Any way you put it, the write-in has the net effect of campaigning for Maddox, and some Negroes know it. I'm not so sure they (write-in leaders) are not in communication with Mr. Maddox."

Mr. Hill noted a news story printed Wednesday in which both candidates declared they would not intervene in matters involving racial integration of professional and college sports in Georgia.

"Big league sports and the power structure have been shrewdies," Mr. Hill said. "They have obtained commitments involving the welfare of their interests.

"But who is looking out for the interests of the poor rural Negroes who do not have the guarantees of a good police

force and community relations that we have here in Atlanta?

"The leaders in this movement are middle-class Negro Democrats," Mr. Hill added. "Atlantans are leading this thing, but they are safe.

"What is going to happen in the hundreds of little hamlets in Georgia where the white leaders feel that the customs should be the same as they were, and if Negroes get out of hand they may do just what Lester Maddox did, go get a stick and a pistol?"

Mr. Hill claimed that "so-called moderates and Negro leaders have deserted their people. These men should sit down and extract promises from both candidates that this state is not going to go backwards."

Mr. Williamson, a long-time Republican, was among Negroes who opposed the write-in statement during a meeting Thursday night.

"I think Mr. Callaway and Mr. Maddox are so afraid of the political climate that neither one would say anything of importance on the subject of race relations," the Rev. Mr. Williams said.

"It is a question of being 'shot to death' or 'starved to death'," he continued. "I'd rather be shot. I hate the agony of being starved. It is a little more humiliating, too."

Atlanta Journal, November 1, 1966

MADDOX PREDICTS 50,000 WRITE-INS

By William O. Smith
Atlanta Journal Staff Writer

STATESBORO, Ga., Nov. 1—Lester Maddox said here Tuesday that the write-in campaign for Ellis Arnall "won't work" and he predicted it will net no more than 40 to 50 thousand votes.

He called leaders of the write-in effort "soreheads," and then he said, "They couldn't get in the front door and now they are trying to slip in the back door like a thief in the night, but it won't work."

Mr. Maddox appeared to be evidencing more and more concern over the Arnall write-in effort. He commented on this at some length Monday during an appearance before members of the Atlanta Press Club.

There, he revealed that he had been in touch with Arnall people in an effort to "get this thing eliminated." And he said he felt he would benefit more than his Republican opponent, Howard (Bo) Callaway, if the write-in movement were stopped.

Mr. Maddox, in a swing through South Georgia, where he reportedly is strongest among voters, spoke at a breakfast meeting here Tuesday morning. Later he was to visit Savannah and Brunswick.

He told the breakfast meeting that his opponent is "calling on the whole power structure of the national Republican Party to help him get elected."

He said the Republicans are "spending $500,000 a week" on Mr. Callaway's campaign but that "the people will say the office is not for sale on Nov. 8."

Addressing a wildly enthusiastic crowd at Dublin Monday night, Mr. Maddox said his opponent is "reaching for the governor's office like a child reaching for a toy" and really has his sights set on the Senate or the vice presidency.

Mr. Callaway doesn't know whether he's "a Democrat or a Republican . . . or a segregationist or integrationist . . . or whether he wants to run for Congress, the Senate or governor," Mr. Maddox charged.

"If he doesn't know where he stands, how does he expect the people to find out?" he asked.

Newsmen covering Mr. Maddox generally agreed that the crowd overflowing the Agriculture Building in Dublin was the noisiest and most enthusiastic of the campaign.

Estimates of the crowd—which came from a 10-county area—exceeded 2,000, and most observers agreed it was a larger turnout than Mr. Callaway's crowd in the same building on Saturday night.

Although the crowd had evangelical fervor for Mr. Maddox made and persons constantly yelled out to him, "Tell heckled newsmen as speaker after speaker denounced newsmen.

"You can't believe the newspapers," one man cried out loudly to raucous laughter. Another cried, "Write that down" when Mr. Maddox made a crowd-pleasing point.

The crowd applauded almost every statement Mr. Maddox made and persons constantly yelled out to him, "Tell 'em, Lester!" and "Go, Lester!"

Mr. Maddox said his opponent has been trying to find "Maddox Country" but that he'll be able to see it on Nov. 8.

Apparently getting more confident, Mr. Maddox said he expects 1,000,000 votes on Nov. 8 if the weather is good. He predicted he will get from 600,000 to 675,000 of them.

Mr. Maddox charged his opponent is "running against the people" and labeled Mr. Callaway the "greatest drop-out of all time."

He said Mr. Callaway "dropped out" of the Board of Regents, broke his promises and pledges and laughed at the people, and has been in, out, in the governor's race.

"He's dropped out of Congress now," he said.

Mr. Maddox said Mr. Callaway's "greatest drop-out will be Nov. 8" and said that after he is inaugurated in January, "he (Mr. Callaway) can drop in and visit me in the governor's office."

Before he spoke to the Dublin group, Mr. Maddox was presented with a check for $500 to help pay his campaign expenses. He quipped that he needed money and campaigned "four months before he got $1,000 in contributions," but then he asked permission to endorse the check to the Gracewood school for the mentally retarded.

In his speech, he promised to increase the state's mental health budget at least 50 per cent during his administration and launch a program to provide a mental health treatment center in every congressional district.

Atlanta Constitution, November 1, 1966

SANDERS COULD GET NEW TERM?

By Bill Shipp

Would you believe Carl Sanders could be governor for the next four years?

That is an outside possibility if neither Lester Maddox nor Howard Callaway gets a majority of votes in the Nov. 8 election, according to a highly knowledgeable source.

The state constitution now empowers the General Assembly to elect a governor from the two top candidates in the event no one gets a majority.

But this source believes that if no one gets a majority, there is a chance that the election would be declared "a failure" and the incumbent governor could remain in office.

Part of the thinking is based on a 1947 decision by the Georgia Supreme Court in the state's famous two-governor case involving Herman Talmadge, Ellis Arnall and M. E. Thompson.

The General Assembly had elected Herman Talmadge as governor.

By virtue of write-in votes he was one of the two top candidates left "in life" after his father's death. His father,

Eugene, had been elected, but died before he could take office.

The Supreme Court ruled that the election by the General Assembly was invalid.

It held that Lt. Gov. M. E. Thompson, who had replaced then governor Ellis Arnall upon Arnall's resignation, would move up to the governor's chair—not the choice of the General Assembly.

Here's a "what-if" situation put forth by one legal expert as a way for the incumbent to remain in the governor's office:

One candidate polls 49 per cent of the votes, another gets 42 per cent, and write-ins account for 9 per cent. That leaves nobody with a majority.

This would throw the election into the General Assembly which already has been held by the federal court to be so illegally constituted that it could not approve a proposed new constitution for being placed on the election ballot.

These experts hold that electing a governor would be of far greater import than placing a proposed constitution on the ballot, and, therefore, the courts would be inclined to rule that the General Assembly could not elect a governor.

That could mean that the election would be declared a failure, and the incumbent would remain in office, in accordance with past court decisions.

Or if the incumbent resigned, the governorship would go to the lieutenant governor.

This was just one of several possibilities mentioned if nobody gets a majority in next week's governor's race.

"One thing you can be certain of, if nobody gets a majority in the election there will be sheer chaos in the capitol," said the highly knowledgeable source.

Atlanta Journal, November 1, 1966

WRITE-IN A WASTE, WELTNER PROTESTS

By Wayne Kelley
Atlanta Journal Washington Correspondent

Retiring 5th District Rep. Charles L. Weltner has called the "Write-in Georgia" campaign "a lost cause" and urged that his supporters spend their time and money in behalf of local Democratic nominees for Congress instead.

Rep. Weltner, who resigned as the 5th District Democratic nominee rather than fulfill a party oath to support Lester Maddox for governor, made his views known during a reception at the American Motor Hotel Monday night.

Some 500 Weltner fans turned out to honor the congressman at the meeting, sponsored by the Fulton County Young Democrats.

HE WAS DIPLOMATIC during his speech, telling the crowd "it is the better part of political wisdom to regret the (races) you have lost, but put your time into the ones you can win."

The races which may yet be won, Rep. Weltner asserted, are those of Democratic congressional candidates Archie Lindsey in the 5th District, and James Mackay in the 4th.

The youthful congressman told his supporters he still intends to write in a candidate for governor, maybe "my father," but added he was against devoting time and money to any organized write-in effort.

FOR THOSE MEMBERS of the audience who thought they were hearing things, Rep. Weltner was much more direct in his comments following the official program.

Several persons wearing "Write-in For Ellis Arnall" badges, most of them women, stepped into a line of people shaking hands with the congressman to ask if he were against the write-in campaign.

"We've lost the governor's race," he told a group of three women. "I don't believe in lost causes."

A platinum blonde woman heatedly debated the point. "If you had said just one word for the write-in!" she argued. "We are working hard, we believe in it, we do have a chance."

"THAT'S YOUR opinion," replied the congressman with a smile, "but it is my opinion that it (the governor's race) is lost."

Rep. Weltner added that "what worries me is that the money and the effort may not go into these other campaigns which we can win."

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An attractive young dark-haired woman, whose name tag identified her as an officer of the Fulton Young Democrats, also complained bitterly.

"I have always applauded for you, but I didn't applaud you tonight," she said. "You stepped down as the nominee for Congress because of your principles. We're your constitutents and we believe in the write-in."

"I'll tell you," said Rep. Weltner with a grin, "the Ku Klux Klan gives me less trouble than you'all."

REP. WELTNER was the hero of local moderates when he stepped out of the general election Oct. 3 because "Lester Maddox represents everything I have fought" during his political career.

But Monday night some of the more vocal moderates were angry at Rep. Weltner—and he was not compromising with them any more than he did on the question of supporting Mr. Maddox.

"Listen, we lost that race," he told one woman who assailed him on the write-in issue, "don't you know that?"

"There comes a time when you lose, as well as a time when you win, and I think you have got to be man enough to recognize that fact," Rep. Weltner said.

DURING HIS SPEECH to the gathering in his honor, Congressman Weltner made it clear where he thought all the money and energies of his supporters should go. He opened his remarks with a glowing endorsement of Mr. Lindsey.

Rep. Weltner also added a good word for incumbent Democratic candidate Mackay in the 4th District.

And he added that "we can win in 1970 for governor."

BUT THOSE supporters who had hoped the congressman might endorse the write-in movement were disappointed.

The audience, which included a large number of Negroes and several elected Negro officials, gave Rep. Weltner warm, if not widely enthusiastic applause.

There were no little old ladies in tennis shoes. But the crowd included a large number of angry young ladies in sling-back heels.

Rep. Weltner's endorsement of Mr. Lindsey for Congress was emphatic. "If I have any credits due now, for any reason, I want to transfer them right now to Archie Lindsey," he said.

The congressman said he had no immediate ambition to return to his 5th District seat.

"I want to see Archie Lindsey elected to the 90th, 91st, 92nd, and 93rd Congress—and as long as he wants to serve this district in Washington," he said.

Atlanta Constitution, November 3, 1966

EUGENE PATTERSON

BACKGROUND TO CHAOS

If the most recently reported Quayle Poll figures are valid, a hectic outcome could conceivably lie ahead in the governor's race. As obtained by The Atlanta Journal's Charles Pou, the figures are reported to show Callaway 44 per cent (up 2 per cent from some three weeks ago); Maddox 27 per cent (down 7 per cent); write-in 7 per cent, and undecided 22 per cent.

Only five more shopping days remain until the election.

Thus undecided votes would seem still to hold the key to a majority for either Callaway or Maddox.

If Republican Howard Callaway's campaign remains static, or gains only 4 or 5 per cent of the undecided vote, and the rest of the undecided vote turns out to be a concealed Maddox vote, then both nominees would lack a majority.

In that case there would be no runoff election. Instead the choice of a governor would be attempted—by voice vote—in the General Assembly. The Georgia Constitution requires this in governor's races, as follows:

"If no person shall have a majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election . . . the General Assembly shall immediately elect a governor viva voce."

That could make for a considerable scene in the halls of the Legislature. Members would be predominately Democratic and bound, by the oath which Charles Weltner dramatized, to support the Democratic nominee, Maddox.

But on a voice vote—as opposed to a formal, recorded roll call vote—there would be no record for the folks back

home to check on how their legislator did vote and the pressures on him might be intense.

Maddox should be favored if the Maddox-Callaway choice were to be made by the General Assembly.

But there is talk of the possibility of legal action to complicate the issue further. It centers on the fact that the House of Representatives is still malapportioned, with rural areas remaining dominant; and because it was ruled to be illegally constituted, a federal court refused to let it submit a new state constitution to the voters two years ago. The legal question now raised being: In view of that, would the courts permit this General Assembly to elect a governor? Or has it gone far enough, on its court-sanctioned timetable of reapportionment, to be a legal body by now?

Others recall that the General Assembly tried to elect Herman Talmadge governor after his father, Gov. Eugene Talmadge, died before inauguration in 1947 and left Herman as the top living candidate (he had gotten a few write-in votes in the general election). The Georgia Supreme Court ruled Talmadge's election by the legislators invalid, declared the general election in failure and ordered the seating of the newly elected lieutenant governor, M. E. Thompson, as governor.

THE ATLANTA JOURNAL
"Covers Dixie Like the Dew"
Since 1883
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EDITORIALS 26 NOVEMBER 4, 1966

THE FULTON COUNTY DELEGATION

THE MOST interesting political development in Atlanta and Fulton County during the year has been the continued growth of the two-party system.

This has brought new vigor as well as new faces to local politics and has given the voter a wider choice. The Journal

has said before and says again that blind partisanship in the cause of one political party is stupid and makes for poor government.

Since the emergence of the new Republican party here during the Eisenhower years, we have urged voting for the better candidate, regardless of the party label.

So far this year this has resulted in The Journal's supporting Bo Callaway, a Republican, for governor; a Democrat, James A. Mackay, for Congress from the Fourth District, and Fletcher Thompson, a Republican, for Congress from the Fifth District.

In the races for General Assembly seats from DeKalb and Rockdale counties we also have made our recommendations with no regard for party affiliations.

Today we offer suggestions for some of the contested races for the General Assembly in Fulton County.

For the Senate:

34th District, GRIFFIN PATRICK JR.
35th District, FRANK E. COGGIN.
36th District, JACK L. STEPHENS.
37th District, JAMES P. WESBERRY JR.

In various House races for Fulton County seats we recommend:

121st District, H. HAMMOND STITH.
122nd District, YOUNG H. LONGINO.
123rd District:

Post 1, RODNEY M. COOK.
Post 2, RICHARD A. GUTHMAN, JR.

124th District, JOHN HOOD.
126th District, FRANK R. LEA.
128th District, TOM DILLON.
130th District, NICK G. LAMBROS.
133rd District, WILLIAM H. ALEXANDER.

136th District, RALPH M. MOORE.
138th Dist., DEVEREAUX McCLATCHEY.
139th District, HASKEW BRANTLEY.
140th District, K. V. R. TOWNSEND.

The next General Assembly is going to be one of the most important in years. It will have the job of reapportioning itself. There is the bare possibility that it will choose the next governor if there is no majority in Tuesday's election. There is the new urge for greater legislative independence plus the fact that the candidates for the governorship of both major parties are more likely to depend on legislative guidance than governors of the past.

This year voting is more important than before. The strong hands which guided us in the past, with legislative concurrence, seem to be weakening.

We may be in for a period of legislative initiative, rather than permissiveness. If so we need good legislators.

Atlanta Journal, November 4, 1966

WRITE-IN LAWYERS LOOK TO COURT TEST

By Steve Ball Jr.

If no candidate for governor receives a majority of votes Nov. 8, there will be legal action unless a run-off election is held, the lawyers' committee of Write-In, Georgia says.

In another write-in development, the officers of a 1,000-member local union announced the union endorses the write-in movement.

At a Thursday afternoon press conference, committee Chairman Joseph Jacobs cited the state Constitution, the new election code and a 1947 court decision which ordered

that the election of a governor by the General Assembly was invalid.

He also pointed out that the current General Assembly is malapportioned and said it would thus not have the authority to elect a governor.

Secretary of State Ben Fortson has said the election would be thrown to the General Assembly if no man gets a majority of the votes Nov. 8.

THE WRITE-IN group hopes its candidate, Ellis Arnall, will pull enough votes to finish first or second against Democrat Lester Maddox and Republican Howard (Bo) Callaway.

Mr. Jacobs also said it is the committee's understanding that if the Nov. 8 election is declared a failure, Gov. Sanders would continue to be governor until such time as there was a legal election.

IF NO CANDIDATE receives a majority Nov. 8 "and a runoff is not directed for Nov. 22, the legality of such failure to call a runoff will be challenged. If this challenge is not sustained by the courts, and the legislature attempts to pick the governor instead of the people voting, this shall also be challenged," Mr. Jacobs declared.

Meanwhile, Local 754, International Chemical Workers Union, unanimously recommended to union members that they "work for, support and write in the name of Ellis Arnold, governor."

The union is composed of employes at Scripto, Inc., here. "We urge each one of our members . . . that they write in Ellis Arnall, governor," president Verena Holt declared.

Atlanta Constitution, November 5, 1966

QUAYLE GOES FISHING

EUGENE PATTERSON

The Quayle Poll figures quoted here two mornings ago turned out to be somebody else's. Pollster Oliver Quayle telephoned from Mt. Vernon, N.Y., to say they weren't his. They were, in fact, figures compiled by Callaway headquarters. (The mistake was nobody's plot, just an inadvertent mixup.)

So the impeccably objective Mr. Quayle, who found Bo Callaway had 42 per cent of the vote and Lester Maddox 34 per cent last Oct. 22, does not vouch for the Callaway headquarters claim that Bo has gained 2 per cent and Lester has lost 12 per cent since then.

Now that the Republican authorship of these figures is straightened out, they become more interesting.

If Callaway could claim only 44 per cent of the vote a week before election day, his campaign obviously may be in trouble.

Moreover, the purported slippage of Maddox strength from 34 per cent to 22 per cent in a two-weeks period taxes the credulity so sharply that one must wonder if the sampling techniques of the Callaway pollsters might not have come inadvertently unglued.

To credit such a slippage would force us to believe that nearly one out of every three Maddox supporters has deserted him since the reliable Quayle Poll findings of two weeks ago. Whereas Maddox addicts are usually fiercer than that.

And from around the state come reports that Callaway is running like a dry creek in many areas where Maddox's pore boy campaign has taken hold.

All a nonpollster can do is guess. But the guess here is that Maddox is running better than the figures indicate. With so unpredictable a candidate, no result is predictable. But Callaway's continuing inability to get over the 50 per cent necessary for a candidate to win has already set some legislators maneuvering into survival gear, against the possibility that neither candidate will get a majority. Legislators would have to do the electing of the governor from the top two candidates, in that event.

Rep. Quimby Melton Jr. of Griffin, for instance, has already informed his Spalding County constituents how he would vote if the governor's race should have to be settled by the General Assembly.

His Democratic oath, he said, binds him to vote for the Democratic nominee "at the general election of Nov. 8, 1966." But that language releases him after the general election of Nov. 8, 1966, Melton said. And he would vote in the General Assembly, not by party, but in support of whichever candidate wins the vote of the people in his county on Nov. 8.

Because the General Assembly is still malapportioned, however, small (Maddox?) counties might have a majority if Melton's thinking were adopted generally. Others think Callaway might win the legislators over in an unrecorded, voice-vote showdown. Lawyers stand by, however, to challenge the legality of any kind of vote by the Legislature, on grounds it is illegally malapportioned.

Where it will all end, only Mr. Quayle can know, and he hasn't even been down here since Oct. 22.

The Atlanta Journal and Constitution, November 6, 1966

GEORGIA POLITICS

by CHARLES POU

LITTLE WRITING-IN FORESEEN AMONG RURAL NEGRO VOTERS

The Ellis Arnall write-in movement likely will get a fairly heavy vote from Negroes in Atlanta. That is, from those who successfully make the effort to write in the name of the former governor and have their votes counted. Actually, it is the opinion here the effect will be the same—count 'em or don't count 'em, Lester Maddox benefits.

In rural areas of the state, however, it is believed the formal write-in vote by Negroes will be minute. A South Georgia citizen, once actively interested in politics and still an interested observer, tells why.

"Down here," he said, "the Negroes are having no part of the write-in campaign because they are frightened by the possible outcome of this election. In Atlanta, Negroes have police protection. South Georgia Negroes are fearful that the election of Mr. Maddox may be interpreted as a license for the lower elements to take over."

The Democratic nominee has asserted repeatedly there will be law and order during his administration if he wins, and that he will run his own show. He says there will be justice for all.

Nevertheless there is fear, out where things can get sticky in a hurry and the unraveling of who done it may take years, if ever, once federal investigators move in.

It is certainly the hope here such fear is unjustified, if Mr. Maddox is the winner. But it is there, out in the boondocks, where petulance, vindictiveness, bitterness, attitude of a curse-upon-both-your-houses, thoughts of sweet re-

venge, and just plain stupidity cannot always be indulged in cozy surroundings.

Fear of the midnight rap on the door. . . . Nightriders. . . . The mean whine of a bullet.

Now COMMENT of a legislator from a small county: "My county is going for Maddox, and if this thing goes to the legislature, don't let anybody kid anybody about it—I am going to have to vote for Maddox. And it will be the county unit system all over again—and he'll win."

Those are no-name comments, because both men live in small counties. There are plenty who have spoken for the record, and some of the things they have said will be summarized once more. The writer also would like to make it plain again that his own objection is not to the idea of write-in—but to the for-
here) effort in behalf of loser Ellis Arnall.

REP. CHARLES WELTNER, a young man of style and class who has already expressed his objection to Mr. Maddox in dramatic fashion, spoke on the write-in subject this week. He told a packed audience of "Write-in Georgia" backers he considers the effort a lost cause. Mr. Weltner said he intends to write in a candidate for governor, maybe "my father," but added he was against devoting time and money to the organized movement.

To some present who wore "Arnall Write-In" buttons, who later wondered if they had heard him right, he was more specific.

"We've lost the governor's race," he told three ladies. "I don't believe in lost causes. . . ."

One in the group continued to argue, and he said with a grin, "I'll tell you, the Ku Klux Klan gives me less trouble than you'all."

JESSE HILL, a veteran worker in the Atlanta Negro movement here, eminently successful at increasing Negro registration, has said:

"I don't see how anybody could join in something to drain off Negro votes. . . . Many of those calling the shots in the Write-In Movement are middle class Negroes with high incomes. They are safe. We have a good police department, a good police chief. But in the little hamlets the election of Maddox by some could be taken in a peculiar way. . . ."

Mr. Hill has argued violently with some of the other leaders in the Negro community about the issue. He has since declared his support for Callaway, calling it "facing up to a nasty political problem."

A news story by Hank Johnson, reporter for The Red and Black, asserts in the current issue of the student newspaper at the University of Georgia:

"Dr. Brett Hawkins of the political science department warned voters that a write-in
Maddox governor and, in the process, smother the fledgling state Republican party. . . .

". . . Hawkins said that the candidates differ in education, their views on supporting federal laws and experience in governmental affairs. . . .

Peyton Hawes of Elbotton, a close loser in the 1962 race for lieutenant governor and urged by some to become a "write-in" candidate: "I told them a political race is very much like a baseball game . . . 'Some you win, some you lose, and some are rained out. I played by the rules and I lost by the rules.'"

A "fuzzy-minded" liberal, "against Maddox and hardly thrilled over Bo," but opposed to the Ellis Arnall write-in campaign: "The many weaknesses in the write-in idea will keep it from drawing a really representative number of moderates and liberals. But the danger is that politicians

may consider this small number of voters as the full force of liberal and moderate opinion in Georgia. . . ."

An Atlanta Rabbi two weeks ago endorsed the write-in movement. Now he is urging members of his congregation to leave it alone.

Still, the idea for the write-in campaign has its appeal, and the guess here is a fairly high vote will be produced by it—possibly enough to put the election of Georgia's next governor up to the Georgia legislature.

Mr. Maddox remains strong in the small counties, although a final prediction will be that Mr. Callaway will win in a close contest.

The backlash and Ellis Arnall backbite factors continue, but there are those who think they see slight gains for Callaway.

Atlanta Constitution, November 7, 1966

POLITICS AND PEOPLE

THE YEAR OF THE SWITCH AND CONFUSION

By Sam Hopkins
Constitution Political Editor

Most Georgia voters probably have never been so emotionally wrung out over a political race.

They have been forced to switch their allegiance over and over again as various factors would suddenly change the course of the campaign overnight.

Oldtimers say they have never seen such a confusing and exasperating election year.

But it will all be over Tuesday—maybe.

Many Democratic voters no doubt were supporting two or three candidates for governor during the course of the campaign. However, a good many likely are on their fourth candidate.

As an example, some started out with former Gov. Ernest Vandiver, who dropped out because of a heart condition. They then switched to State Sen. Jimmy Carter. Next they supported former Gov. Ellis Arnall when he got into a run-off with Lester Maddox, and now some of them will vote for Republican Howard (Bo) Callaway in the general election. There are many other variations.

It's enough to make a voter wonder what he really believes in.

But the result of the whole campaign probably is a good indication that the average voter is pretty flexible when it comes to deciding whom he will vote for and also that no candidate is indispensable, if anyone was ever in doubt.

This also has been the year for more political polls than the state has ever had to endure—filling station polls, "sophisticated" polls, newspaper and radio polls, straw polls, barbershop polls, reliable polls, unreliable polls and even non-existing polls which got published as the gospel truth.

Some observers now believe the race between Republican Bo Callaway and Democrat Lester Maddox will be so close that a write-in vote of at least 100,000 for Arnall would be enough to keep anyone from winning with a majority of the votes.

That eventuality opens the doors for all sorts of possibilities.

First, a suit likely would be filed to force a run-off election two weeks later to let the people decide the winner.

As it is now written in the state constitution the Legislature must decide the winner. And while we're on it, this law seems to be rather antiquated. The voters can decide primary winners in a run-off, so why not in the general election which, since the buildup of a two-party system, is much more important than the primary.

(Then there is the possibility that if the election is thrown into the Legislature the federal court will rule that it is too mal-apportioned to decide the outcome of a governor's race.

The court would not be treading new ground in such a case. Several years ago it ruled that a new state constitution passed in the General Assembly would not be submitted to voters in the general election because the Legislature was malapportioned.

And if the court so ruled?

Gov. Carl Sanders, who could remain governor until the next general election two years away, likely would say he would prefer not to serve further on a technicality and then Lt. Gov. George T. Smith could become acting governor.

That would be the irony of the decade, because Smith wanted very much to run for governor this year but decided on the No. 2 post because he couldn't get enough backing.

But this is all speculation. Who knows what the federal court might do, as they say out in the boondocks.

If one had to make a prediction—and one doesn't—it would have to be that no one will get a majority of the votes in the governor's election on Tuesday.

Atlanta Journal, November 7, 1966

NEGRO LEADERS SUPPORTING GOP

By William O. Smith and Steve Ball Jr.

Howard (Bo) Callaway and Lester Maddox were setting as fast a pace as ever on election-eve Monday as they campaigned for the last-minute votes that could swing a close race in their favor.

Instead of relaxing on the day before the election as most candidates do, both men planned a busy day of moving about the state.

Mr. Callaway, seeking to become the first Republican ever elected governor in Georgia, was to speak Monday afternoon in Waynesboro and move on to Savannah for a rally Monday night.

He then planned to fly to his home near Pine Mountain to spend the night and vote early Tuesday before returning to Atlanta to await results.

Mr. Maddox, who unexpectedly won the Democratic nomination, had an even busier day.

Mr. Maddox said Monday afternoon he doesn't think there is a white backlash, but merely people concerned with individual liberty. At a press conference in Chattanooga, the Democratic candidate for governor said he doesn't think the label "Mr. White Backlash" fits him. He said people support him because of his stand on individual rights.

Through geographical quirk, the Democratic nominee held what was to be his final press conference before the election just across the Georgia line. He flew into Chattanooga because it was the nearest airstop to Rossville, Ga., the first town in a series of handshaking appearances Monday afternoon.

Asked for a final prediction of Tuesday's outcome, Mr. Maddox said he believes a million or more persons will vote, and he will get from 58 to 62 per cent of their ballots.

At the press conference, Mr. Maddox reiterated that he will not support a third-party candidate in 1968 and if he cannot support the Democratic nominee for president, "I still won't jump the fence.

"I think we can do the best job within the Democratic party," he said.

He again expressed hope that the write-in movement will "fizzle out" and said he thinks a lot of those who plan to write in would likely just not vote if there were no formal write-in movement.

Mr. Maddox, saying he wanted to spend more time in North Georgia, traveled to Rossville, Calhoun and Dalton Monday afternoon.

His plans for election day begin at 9 a.m. when he will vote in Atlanta. Later, he said, "My wife and I are going to visit the Mansion again. It looks like it may be March before we move in."

The candidate said he will be at his headquarters at the Henry Grady Hotel in Atlanta most of Tuesday afternoon, then will go home to rest for a while and return to headquarters to await the results about 8 p.m.

ASKED ABOUT the strength of the Democratic party, Mr. Maddox said he believes that it is stronger in Georgia than ever before.

"Gov. Sanders is working strong for the nominees," he said. And, he continued, Sens. Richard B. Russell and Herman E. Talmadge are supporting the party, along with most state and local officeholders and just plain people at the grass-roots.

AS THEY neared the end of many months of campaigning, both candidates confidently predicted victory but many observers believe the race is neck-and-neck—accounting for the fast pace Monday.

Before leaving Atlanta on his last campaign jaunt, Mr. Callaway issued a statement saying "from all reports we are receiving on the eve of the election, it appears we shall win by a large majority."

Mr. Callaway appealed for votes from Democrats, independents and Republicans because he said he believes he is "best qualified by experience, temperament and responsibility."

"I feel that a vote for my opponent could lead towards chaotic conditions towards our state for the next four years," he said.

"I feel a write-in vote would be a vote for my opponent, or at best would lead only towards chaotic conditions for many months while the issue is contested in the General Assembly and the courts.

"In recent days, write-in supporters have been shifting to me after weighing, as one said, the prospects of four years under my opponent."

Travis Stewart, former executive secretary of the State Democratic party, predicted a Maddox victory by upward of a 100,000 vote margin.

The write-in campaign on behalf of former Gov. Ellis Arnall continued to befuddle experts.

Jesse Hill, prominent Negro businessman, said Monday he believes the write-in effort is "a lost cause" and urged Negroes to vote for Mr. Callaway.

He said he personally feels that "if Callaway is elected governor he will do more to improve the lot of the Georgia Negro than has been the case under the present governor, Carl Sanders."

He predicted a Maddox victory "could lead to bitter strife and terrible rioting over this state generated by a klan-type people who would interpret a Maddox victory as a license to turn back the clock in race relations."

Atlanta Postmaster George W. Camp said the Post Office Annex stayed open 10 hours overtime Saturday to handle the crush.

Atlanta Journal, November 7, 1966

STEPS TAKEN TO OBEY COURT IN ELECTION

By William B. Williams

Unusual legal factors surround Georgia's Tuesday general election and steps are being taken to prevent adverse legal action.

The factors came about when a three-judge federal court maintained jurisdiction in a suit regarding the election.

The suit contended that ballot secrecy was not being afforded in some cases of write-in voters.

Also, the suit claimed, oppressive regulations prevented illiterate voters from getting persons to assist them.

Also discussed, and noted by the court, was that variations in name spelling could possibly be used to prevent write-in candidates from getting all the votes cast for them.

The court formally ordered that a person could assist as many as 10 illiterate voters in the election and that a 1966 law limiting assistance to one illiterate is unconstitutional.

Since the court took jurisdiction over the case until after the election, many election irregularities which otherwise would be brought up in state court would fall under the jurisdiction of the three-judge court.

Appeals from a three-judge court are taken directly to the U.S. Supreme Court, thus bypassing the U.S. Circuit Court of Appeals.

Probably any violations of ballot secrecy, bars to assistance of illiterate voters and indiscriminate use of name spelling rulings would go before the federal court.

Behind scenes last week, officials worked quietly to see that all of the state's 159 county ordinaries got the word of the court's opinion.

A few ordinaries had stated off the record they did not believe they could change their methods unless formally ordered.

ALTHOUGH the ruling on the election was handed down informally Friday, Oct. 28, it was not until late last Friday afternoon before the state attorney general's office was able to get out certified copies of the court's judgment to ordinaries.

Before a letter had been sent informing ordinaries that the court had ruled on the voter assistance law, but this had no legal effect. Any or all ordinaries could have ignored the court.

Legal care, one official said, must be used in this election. Some believe legal efforts could be made to turn over the election.

One problem which would come up if no candidate receives a majority vote in the governor's race is a provision which allows the legislature to decide the election when there is no majority.

The lawyers' committee of Write-In, Georgia, said the state Constitution, the new election code and a 1947 court decision show the General Assembly cannot legally elect a governor.

Also, legal committee Chairman Joseph Jacobs said, the current malapportionment of the General Assembly would prohibit it from electing a governor, for such an election would not be related to popular vote.

THE WRITE-IN group hopes Ellis Arnall, beaten in the September Democratic primary, will come in first or second in the race.

Mr. Jacobs said he and his committee believe that if the Nov. 8 election is declared a failure, Gov. Sanders would continue in office until a legal election could be held.

Checks with ordinaries show that most, if not all, are trying to see that the letter and spirit of the law is followed Nov. 8.

Where Votomatics or machine voting is conducted, voters will get a write in ballot in an envelope. Regardless of whether they use it, they are required to turn the envelope back in. Otherwise, ballot secrecy would not be accomplished.

CHARLES MORGAN JR., attorney for the American Civil Liberties Union which brought the suit, said persons wishing to write in a candidate must use a mixed party ticket. If the straight ticket is used and a gubernatorial candidate is written in, the vote in the governor's race will not count, he said.

Also, he continued, the court has allowed that it is proper for poor-spelling voters to carry slips of paper with correct spelling into the polls.

Illiterates who want to get a person to assist them must take an affidavit in the polling place that they are illiterate and need someone to help them.

Atlanta Constitution, November 8, 1966

EUGENE PATTERSON

PREDICTION: VERY CLOSE

The only prediction that will be ventured here is that today's race for governor will be close. Something near 400,000 votes is likely to go to each nominee, which would mean the high man will be the one who can stretch higher above an already high base.

In such a circumstance, a relatively small write-in vote for a third candidate could keep either of the nominees from getting a majority.

In that event, the Legislature would pick one of the top two men as governor. But legal action has been threatened to prevent the Legislature from doing so, on grounds it is malapportioned.

In that case Gov. Carl Sanders might stay temporarily as governor, or resign—as he more than likely would—and let the newly elected lieutenant governor, George T. Smith take over until the courts and the Legislature settled on the new governor.

Whatever the outcome, both nominees must have been sobered a little by the cool and even hostile response their extreme conservatism drew outside the extreme conservative wing to which they belong politically.

Either one might be a better governor because of this experience.

Both have found how hard it is to fly on one wing. They have discovered the importance of broadening their approach to encompass more than the special ideas and interests they rode to prominence.

This cannot help but be an educative and moderating influence on both, even though the apparent closeness of their race is subjecting the state to a cliffhanger election that is utterly unpredictable.

Their own recognition of each other's strength was demonstrated most clearly in their decision to campaign right into election eve.

Democrat Lester Maddox's power base lay in that area of extreme conservatism which is preoccupied with race. His only hope of broadening it lay in persuading party-lining, never-vote-Republican Democrats to stay with the party even if they disagreed with his racial extremism.

Republican Howard Callaway's power base turned out to be middle-to-upper class conservatives, many of whom are the state's traditional Republicans, after Maddox took

all-out segregationist votes Callaway had once counted on. Callaway's only hope of broadening his narrowed base to victory size depended then upon turning around and hoping for moderate votes he hadn't expected to need, and he approached this task without much enthusiasm, largely by indicating he was more presentable than his opponent.

Maddox felt he was losing party-lining prospects to the write-in whereas Callaway felt he was losing moderates to it. Each tried to stop it, feeling it was hurting him worse than the other.

Now comes the decision. The people will dispose. Whichever may have broadened his base enough to win should be permanently chastened by the knowledge that his victory margin depended on votes reluctantly given.

Atlanta Constitution, November 10, 1966

SMITH SAYS ASSEMBLY TO DECIDE

By Joe Brown
Constitution Staff Writer

COLUMBUS, Ga.—Lt. Gov.-elect George T. Smith predicted Wednesday that the federal courts will allow the General Assembly to choose Georgia's next governor.

"The court has ruled that the Georgia House and Senate are legally apportioned to attend to business of the state until May 1 of next year," Smith said here and in Macon on the first day of the Georgia State Chamber of Commerce's Pre-Legislative Forum.

Smith, touring with spokesmen for Democratic nominee Lester Maddox and for Republican Howard H. (Bo) Callaway, told the crowd of about 150 that the major issues facing the next session of the General Assembly are a $1.5 billion appropriation bill and reapportionment.

The lion's share of the record money bill, he said, will probably go to financing of education.

Rep. Mac Barber of Commerce, Maddox's spokesman, said in Macon that the Democratic candidate has pledged to give beginning teachers a $1,200 a year raise starting July 1, to take steps to reduce the teacher-pupil ratio in the first grade and to institute a statewide kindergarten program.

Barber, immediate past president of the Georgia School Boards Association, said Maddox has pledged that he will not refuse any federal aid to education nor close any schools.

He has also promised, said Barber, not to interfere with the curricula of the state's schools nor infringe on academic freedom in the University system.

If there is any fight against the federal school desegregation guidelines, Barber said, he has been assured that it would either be through the courts or by Georgia's congressmen.

"Under no circumstances will there be any interference except through legal means," Barber said.

Callaway's spokesman, Sen. Oliver Bateman of Macon, told the group that the Republican would accelerate the state's interstate highway program.

He has also pledged, said Bateman, that his administration would "neither be Republican nor Democratic, but a Georgia administration."

The Pine Mountain congressman would draw his leaders from the ranks of Democrats, Republicans and independents, Bateman said.

Asked about the write-in vote for Ellis Arnall, which apparently has thrown the election into the General Assembly, Bateman said:

"It proves to me that there are still people in Georgia who had rather tear down than build."

Exhibit B to Motion for Preliminary Injunction

THE ATLANTA CONSTITUTION

For 99 Years The South's Standard Newspaper

Page 4 *Monday, November 14, 1966*

CLOSE-UP

IF NO WRITE-INS, THEN WHAT?

If write-ins are barred in the runoff election for governor that almost surely will be held, don't bet too soon where the Ellis Arnall people will go.

A great number, perhaps most would go fishing. Negroes in particular would find no choice at all. There was already a considerable drop in total voting between the Democratic runoff and the general election in Atlanta's Negro precincts, even with the alternative of a write-in available. Among those who did vote Nov. 8, the write-in vote was high.

But what about those who do decide that if a choice must be made, they may as well participate in it?

They already have concluded that neither Bo Callaway nor Lester Maddox is palatable; otherwise, they would have voted for one or the other. So picking one over the other now will, for them, require some tortuous reasoning . . .

And no little emotion, since they are on average no more immune to visceral reactions than any other group of voters.

Fear of Maddox and revulsion at his stands on race and "patriotism" are of course strong reasons for their voting against him.

But there are newer sets of resentments which may lead many to vote against Callaway.

Perhaps most potent is resentment at having the Democratic primary "stolen" from them—not by Maddox people,

but by Callaway people. There was strong evidence of massive Republican crossovers at the time of the runoff. But the results of last week's general election balloting without question confirm the crossover.

In 55 counties, Lester Maddox's total was less in the general election than in the runoff—even though the total vote in those counties was higher. These naked crossovers come to about 25,000. It's impossible to be sure how many more are masked by the greater total.

In Atlanta's Eighth Ward alone, there were 1,693 naked crossovers. There were another 1,438 in Sandy Springs. There were 212 in the Medlock box in DeKalb alone.

Mr. Callaway further antagonized the moderates and liberals by his failure to make any gesture in their political direction. His polls erroneously said he didn't need them; he expected to win by about 54 per cent of the total; so he sat tight.

And just last Friday, his attitude toward write-ins in any runoff showed his lack of political sagacity. His people wanted to bar write-ins. Lester Maddox astutely had something nice to say about the right to write-in.

Mr. Callaway apparently believes that if there is no write-in option, the votes will come to him. He'd better be careful.

BRUCE GALPIN.

Exhibit C to Motion for Preliminary Injunction

Atlanta Constitution, November 9, 1966

ARNALL BACKERS CHARGE ERRORS, PLAN U.S. SUIT

By Bill Shipp

Write-in, Georgia officials prepared to take the state's election results to federal court Wednesday.

A spokesman said the group backing the write-in candidacy of Ellis Arnall is contemplating filing suit immediately to have all the ballot boxes in the state impounded as a result of "a flood of irregularities" in voting reported over the state.

And the Southern director of the American Civil Liberties Union said he was studying the possibility of seeking contempt of court action against several county ordinaries.

Studies Complaints

Attorney Charles Morgan Jr. of the ACLU said Tuesday night he was "studying hundreds of complaints" relating to a federal court case brought by the ACLU to guarantee that write-in voters were assured of the right of secret ballots. Morgan said it appeared "that more than one of the ordinaries may not have abided" by the order in the case.

Meanwhile, Secretary of State Ben W. Fortson said he had received numerous reports of irregularities.

There were reports that poll managers in some precincts were asking voters if they had written in and were discarding the special write-in envelopes of those who said they had not.

Write-in Query

When a reporter voted at populous Fair Oaks in Cobb County, he took a write-in envelope from the counter with

his Votomatic card. After leaving the booth to deposit the card and envelope a poll worker asked, "Did you write-in?"

When he said he did, he was told to place his ballot in a separate box.

There were other reported instances of polling places running out of write-in forms. The write-in spokesman said there were reports from Newnan that poll managers were refusing to allow persons to have help in the polls unless they were illiterate.

Refused Help

About 400 literate persons were milling around the polls at one point because they had been refused help, the spokesman said.

The federal court last week overturned a Georgia law dictating that only one person could help one other person at the polls. They ruled that one person could help 10 others, but did not limit the help to illiterates.

Fortson said his office had been flooded with calls all day.

Ignore Order?

"Everybody is overlooking the directive of the federal court," Fortson said. "There seems to be a lot of confusion."

Hosea Williams, an aide to Dr. Martin Luther King and one of the driving forces behind the write-in campaign, charged that "they aren't counting half our votes."

"We've got reports that in some counties they just aren't counting the write-ins at all," he said.

Write-in Hope

Although it appeared late Tuesday that the write-ins would not keep the winning gubernatorial candidate from

getting a majority of the votes, it was almost a certainty that Georgia's election outcome will be in the breast of the federal court by the end of the week.

The write-ins had hoped to keep any candidate from getting a majority. Under Georgia law, the election would then be thrown into the legislature and that body would pick the winner. But the write-in backers also planned to challenge this, on the grounds that the legislature is malapportioned.

Atlanta Constitution, November 9, 1966

ARMDILL OR ARNADE OR ARNELL?

His proud parents christened him Ellis Gibbs Arnall 59 years ago.

But it will take a federal judge and all his wisdom to say whether the East Point voter had in mind the former governor when he wrote in the name of "Armdill" in Tuesday election.

And who is Arnade? Did another East Point voter have in mind Ellis Gibbs or was he casting his ballot for his best friend, a chap named Arnade?

Then there's Ellis Arnold. That citizen picked up seven votes in East Point, 26 in Precinct 1-E and 5 in 4-D.

And to add to the confusion, write-ins were filled in for the names of Arnell, Arour (he got 13 votes in 1-E) and Harner (a chap who picked up support from 10 voters in 1-E).

To add to the confusion 21 voters in 1-E correctly spelled Ellis Arnall's name but forgot to signify what office they want him to fill. Governor? Judge of Superior Court? House of Representatives, 123rd District (Post 1)?

Maybe a federal judge will have the answer.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant,*

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees.*

Appeal from the United States District Court
For the Northern District of Georgia
Atlanta Division

BRIEF ON BEHALF OF APPELLEES, JUSTICE, et al.

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Ga. Const., art. I, § V, para. I, Ga. Code Ann. § 2-501 .. 10
Ga. Const., art. V, § I, para. II, Ga. Code Ann. § 2-3002 10
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Ga. Code Ann. § 34-1515 (Ga. Laws 1964, Extra. Sess. pp. 26, 175) 23

MISCELLANEOUS:

Ga. General Assembly, Senate Journal, 1964 Extra Session 22
Ga. General Assembly, House Journal, 1964 Extra Session 22
McElreath, A Treatise on the Constitution of Georgia (1912) 4
Proclamation by Hon. Carl E. Sanders, Governor of Georgia, Ga. Laws 1964, Extra. Sess. pp. 1-2 22
Proposed Constitution of Georgia of 1964, art. IV, § 7, Ga. Laws 1964, Extra. Sess., pp. 234, 285-86 22
Record, Fortson v. Toombs, 379 U.S. 621 (1965) 22
Dixon, Reapportionment in the Supreme Court and Congress: Constitutional Struggle for Fair Representation, 63 Mich. L. Rev. 209 (1964) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*,

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees*.

Appeal from the United States District Court
For the Northern District of Georgia
Atlanta Division

BRIEF ON BEHALF OF APPELLEES, JUSTICE, et al.

QUESTIONS PRESENTED

The decision of the District Court presents a pressing question of paramount importance—whether the people of Georgia, having failed to cast a majority of their ballots for a single candidate in the November 8 general election for Governor of Georgia, can constitutionally be deprived of the opportunity to elect the Governor of Georgia in a runoff election as provided by

Section 34-1514 of the 1964 Georgia Election Code. The appellant asserts that this crucial choice of the Chief Executive of the State has been taken from the people and placed in the General Assembly by the provisions of an 1824 amendment to the Georgia Constitution. The District Court held this provision of the Georgia Constitution to be unconstitutional under the decision of this Court in *Gray* v. *Sanders,* 372 U.S. 368 (1963), and enjoined the selection of the Governor by the General Assembly. This decision of the District Court is plainly correct and should be summarily affirmed by this Court.

STATEMENT OF THE CASE

This is an appeal from a decision of a three-judge United States District Court for the Northern District of Georgia rendered on November 17, 1966 (R. 226-32), declaring unconstitutional and enjoining (R. 233) the enforcement of a provision first appearing as an 1824 amendment of the Georgia Constitution authorizing the election of the Governor of Georgia by the General Assembly when no candidate has received a majority of the total votes cast in the general election as required by the Georgia Constitution. Ga. Const., art. V, § I, para. IV.

This action (R. 106) was brought by a group of citizens of Georgia residing in counties through the State who voted in the November 8, 1966 general election for Governor to secure for themselves and the people of Georgia the basic right to make the final selection of the Governor of Georgia in a direct popular election as provided by the General Assembly of Georgia in Section 34-1514 of the Georgia Election Code of 1964 which provides:

Majority vote required to nominate or elect; exception; runoff primary or election.—No candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes, on the fourteenth day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624. . . . Ga. Code Ann. § 34-1514 (Ga. Laws 1964, Extra. Sess., pp. 26, 174-75).

Georgia is one of the few[1] states which require the election of her Chief Executive by a majority, rather than a plurality, of the votes cast in the general election. Ga. Const., art. V, § I, para. IV. In the November 8, 1966 general election, however, no candidate for Governor of Georgia received a majority of the total votes cast in the general election. The results were as follows (R. 142, 157, 180):

[1] See, e.g., Vermont Const., ch. II, § 39.

Candidate	Total Votes	Percentage
Howard H. Callaway	449,894	47.07%
Lester G. Maddox	448,044	46.88%
Ellis G. Arnall	57,832	6.05%
Total Votes Cast	955,760	

The only obstacle to the election of the Governor by the people of Georgia in a runoff election is the provision of the Georgia Constitution which was initially adopted in 1824[2] and which provides:

> How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; *but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice.* Ga. Const., art. V, § I, para. IV. (Emphasis supplied.)[3]

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[2] McElreath, A Treatise on the Constitution of Georgia §§ 84, 423 (1912).

[3] The District Court held the italicized portions of the Georgia Constitution to be invalid. (R. 229-31)

On October 21, 1966, the Attorney General of Georgia rendered an official opinion (R. 142, 145-48, 179) stating the provisions of Section 34-1514 of the Election Code to be in conflict with the provisions of the Georgia Constitution quoted above and to be controlled by the latter in the event no candidate for Governor received a majority in the general election.

The Malapportionment of the General Assembly

When the General Assembly convenes in January 1967, there will be substantial disparities in the apportionments of both the House and Senate. Under the present apportionment of the House, a mere 42 per cent of the population, based on the 1960 United States Census, controls an absolute majority of the 205 House seats. Almost three-fourths of the House districts deviate more than 10 per cent from average, more than one-half of the districts deviate more than 15 per cent from average, while more than one-third of the House districts deviate from average by more than 20 per cent. These disparities, together with the disparities based on the 1965 census as projected by the Georgia Department of Public Health (GDH), are summarized in the following table and are more fully reflected in Appendix *B*.[4]

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[4] The statistics for 1960 are from tables appearing at R. 143, 158-74, and 180. The statistics for 1965 are based on estimates from information compiled by the Georgia Department of Public Health appearing at R. 143, 175-77, 180. This statistical information is summarized in Appendix *B*, *infra*.

HOUSE OF REPRESENTATIVES

	1960 Census	1965 (GDH)
Population Having Control	42.3%	41.2%
Ratio of Largest District to Smallest	1.97:1	2.61:1
Number of Representatives in Most Over-Represented Districts Having 20% of Population	54	56
Number of Representatives in Most Under-Represented Districts Having 20% of Population	34	30

Similar disparities also exist under the 1962 apportionment of the Senate and are summarized in the table below:

SENATE

	1960 Census	1965 (GDH)
Percentage of Population Having Control	48.2%	46.6%
Ratio of Largest District to Smallest	1.81:1	1.86:1
Number of Senators in Most Over-Represented Districts Having 20% of Population	12	13
Number of Senators in Most Under-Represented Districts Having 20% of Population	9	9

In *Toombs* v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), the District Court found the apportionment of both the House and the Senate to be unconstitutional under the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). It said:

> The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives [effected in 1965], separately and collectively, fall short of the mandate of the equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in Reynolds v. Sims and related cases, supra. . . . 241 F. Supp. at 73.

The District Court refused, however, to require immediate reapportionment and approved the continuation of the General Assembly on its present basis until the 1969 session. *Ibid.* This Court affirmed the District Court's ruling. *Toombs* v. *Fortson,* 384 U.S. 210 (1966) (per curiam).

The 1966 Elections

On September 14, 1966, the Georgia Democratic Party conducted a primary election for nominees for Governor of Georgia among six candidates. (R. 141, 179). Although Ellis Arnall and Lester Maddox were the two candidates receiving the highest number of votes, neither received a majority as required by Section 34-1514 of the Georgia Election Code. (R. 141, 179). On September 28, 1966, the Democratic Party held a runoff primary as required by Section 34-1514 in which more than 800,000 people participated. Lester Maddox received a majority of 70,051 votes and thus became the Democratic nominee for Governor. (R. 141-42, 179).

The Democratic Party also conducted a primary election for nominees for the House of Representatives and Senate of the General Assembly. (R. 142, 179). As a condition of participation in the Democratic primary, each candidate for the General Assembly was required to execute a Declaration of Candidacy (R.

142, 149, 150, 179) in which he pledged his support of "the nominee of the Democratic Party." (R. 149-50). In the ensuing general election, 183 Democrats and 21 Republicans were elected to the 205-member House. (R. 143, 180). No candidate received a majority in one House district, and a runoff was held on November 22, 1966, between the two candidates receiving the highest number of votes in the general election pursuant to Section 34-1514 of the Election Code. Forty-six Democrats, 7 Republicans and one independent were elected to the Georgia Senate. (R. 143-44, 180).

The name of Howard H. Callaway was placed on the general election ballot as the nominee for Governor of the Georgia Republican Party by petition of at least five per cent of the total number of eligible voters in Georgia as provided by Section 34-1010 of the Election Code. Ga. Code Ann., § 34-1010 (Ga. Laws 1964, Extra. Sess., pp. 26, 93-95). (R. 142, 179).

SUMMARY OF ARGUMENT

The Georgia Constitution places the election of the Governor of Georgia on a popular basis. Having placed the election of Governor on a popular basis, the State is prohibited from employing any device, whether a county unit system based on legislative seats, or a more direct method of selection by the legislators themselves, which dilutes, distorts or disregards the votes of any of its citizens. *Gray* v. *Sanders*, 372 U.S. 368 (1963).

The 1824 amendment to the Georgia Constitution which provides for the final selection of the Governor of Georgia directly by the legislators results in an unconstitutional weighting and distortion of the popular votes cast in the general election and, thus, violates the Equal Protection Clause. Since each vote of each legis-

lator is indivisible it must be cast as a unit and cannot therefore adequately reflect the will of a portion of his constituency, whose wishes will thereby be disregarded in the selection of their Chief Executive. *Gray* v. *Sanders, supra,* at 381 n. 12. Further, the Georgia Constitution imposes no obligation upon a legislator, in selecting the Governor, to obey the wishes expressed by a plurality or even a majority of his constituency and thus is even more objectionable in a constitutional sense than a unit formula recognizing the plurality or majority vote. Although these constitutional infirmities would exist even if the General Assembly were fairly apportioned, they are aggravated by the substantial disparities existing in the present apportionment of both houses of the General Assembly which deprive voters in many areas of the state of an equal voice in the selection of their Governor. *Cf. Reynolds* v. *Sims,* 377 U.S. 533 (1964). They are further aggravated by the pledge of the large majority, 88.4 per cent, of the General Assembly to support the nominee of their Party. Whether considered separately or in concert, these factors require that the provision of the Georgia Constitution, providing for the final selection of the Governor of Georgia by the legislature rather than by the people, be held by this Court to be violative of the Fourteenth Amendment. Once the obstacle of this provision has been removed, a runoff election for Governor of Georgia can then be held in the manner prescribed by the General Assembly in Section 34-1514 of the Election Code. A runoff to secure a majority vote is traditional in Georgia and can be held in this instance, at direction of the Court and in accordance with Georgia law, without difficulty or further delay.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THE PROVISION OF THE GEORGIA CONSTITUTION, WHICH DEPRIVES THE PEOPLE OF THE RIGHT TO MAKE THE FINAL SELECTION OF THEIR GOVERNOR AND WHICH PLACES THE CRUCIAL CHOICE IN THE HANDS OF THE MALAPPORTIONED GENERAL ASSEMBLY, TO VIOLATE THE FOURTEENTH AMENDMENT.

The right of the people of Georgia to elect their Governor is established by and pervades the Georgia Constitution. Ga. Const., art. V, § I, paras. II, IV.[5] Having placed the election of the Governor of Georgia on a popular basis, the State is prohibited from thereafter employing any device, whether a county unit system based on legislative seats, or a more direct method of selection by legislators themselves, which in any way dilutes, distorts or disregards the vote of any citizen. Thus, as this Court emphasized in *Gray* v. *Sanders,* 372 U.S. 368 (1965),

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[5] Ga. Const., art. V, § I, para. II, provides that the Governor shall be elected "in the manner prescribed for the election of members of the General Assembly, and the electors shall be the same."

The Bill of Rights of the Georgia Constitution provides:

> All government of right originates with the people, is founded upon their will only and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and at all times, amenable to them. Ga. Const., art. I, § I, para. I.

And see Section V of the Bill of Rights. Ga. Const., art. I, § V, para. I. As the Supreme Court of Georgia emphasized in *Thompson* v. *Talmadge,* 201 Ga. 867, 883, 41 S.E. 2d 883, 896 (1947), it was "the very definite and clear intention [of the Georgia Constitution] that in every case the matter of electing a Governor must be as completely as possible governed by the expressed choice of the people. . . ."

> The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President. . . . But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. . . .
>
> The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing —one person, one vote. *Id.* at 380-81.

It is clear that these principles are violated by the provisions of the Georgia Constitution which seek to take from the people of Georgia the right to elect their Chief Executive, when no candidate receives a majority in the general election, and to place the power of final selection of the Governor in the hands of the malapportioned General Assembly. *Gray* v. *Sanders, supra; cf. Reynolds* v. *Sims,* 377 U.S. 533 (1964). *Baker* v. *Carr,* 369 U.S. 186 (1962). The District Court held that the final selection of the Governor by the General Assembly, rather than by the people of Georgia, results in an arbitrary weighting of the votes cast in the general election in which the popular will, as expressed in the general election, may be totally disregarded. (R. 229-30). It thus held the election of the Governor by the General Assembly to be prohibited by the Equal Protection Clause and the decision of this Court in *Gray* v. *Sanders.* (R. 230).

In *Gray* v. *Sanders,* this Court held that the weighting of the votes of citizens participating in primary elections for nominees for Governor of Georgia in proportion to their representation in the lower House of the General Assembly to violate the Equal Protection

Clause of the Fourteenth Amendment. Under the Georgia county unit system, the unit votes were distributed among the various counties of the State based upon their respective representations in the House of Representatives of the Georgia General Assembly which was then apportioned on an arbitrary 3-2-1 system. In all primary elections for Governor, Senator and other statewide officers, each candidate received the *entire* unit vote of each county which he carried. Although this Court, in invalidating the unit system, placed principal reliance upon the gross disparities which existed under the unit system, it also emphasized that any unit system of nominating a Governor would be unconstitutional even if the units had been allocated strictly in accordance with population, since a prohibited weighting of votes would continue. The distortion and weighting of the popular vote resulting from such a unit system was emphasized by Mr. Justice Douglas:

> The county unit system, even in its amended form . . . would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. *Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population.* Thus, if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded. 372 U.S. at 381 n.12. (Emphasis supplied.)

The same considerations which led this Court to invalidate the Georgia county unit system also require the invalidation of the provisions of the Georgia Constitution seeking to authorize the selection of the Governor by the legislature. The constitutional man-

date cannot be evaded merely by the substitution of legislators for the county units. Any exception to the constitutional principles of *Gray* v. *Sanders* to permit the final selection of the Governor of Georgia by the General Assembly would merely stand as a challenge to the ingenuity of those who would seek to evade the mandate of the Equal Protection Clause and thus to frustrate the properly expressed will of the people.

Indeed, the election of the Governor of Georgia by the General Assembly, rather than by the people of the State, is even more clearly violative of the Fourteenth Amendment than was the county unit system. Unlike the county unit system, which operated only at the *preliminary* nominating stages of the election, the Georgia constitutional provision operates only at the crucial *final* stage of the election process by placing the ultimate power of election of the Governor in the General Assembly, if no candidate receives a majority in the general election. And under the unit system, the entire unit vote of a county went automatically to the candidate who received a plurality in that county.

Each legislator would have but a single vote in the election of the Governor, and thus would vote as a unit, and necessarily disregard some of the votes of his constitutents. Recognizing this, the District Court stated:

> [E]ach legislator would stand as a unit in selecting the Governor, and his vote would necessarily eliminate the will of his constituents who voted for the other candidate. (R. 230).

Even though the members of the General Assembly, in choosing the Governor, might vote as did their respective constituencies, the evils inherent in a county unit system of election would nevertheless be present.

Thus, in Cobb County, in which Callaway received a bare plurality of 14,947 votes over the 14,692 votes cast for Lester Maddox, (R. 142, 152, 180) Callaway would receive the entire vote of the 7-member Cobb legislative delegation. The votes of more than 14,000 other people in Cobb County who voted for Lester Maddox would be effectively disregarded, or perhaps more accurately, treated as if they had been cast for the prevailing candidate, Callaway. Such a unit system necessarily results in a weighting and distortion of the votes cast for different candidates and in different areas of the State, which the Constitution prohibits. The consequences of the unit vote become even more apparent on a statewide basis. If, in choosing the Governor, each Senator and Representative voted for the candidate receiving a plurality of the votes cast in his district, Lester Maddox would receive a clear majority of 54 per cent of the votes in the legislature, even though he received a lesser number of popular votes than did Callaway, See Appendix *C, infra.*

Furthermore, the system for election of the Governor by the General Assembly, invalidated by the court below, has even more serious constitutional infirmities than the county unit system considered in *Gray* v. *Sanders* for another reason. A legislator would not be bound by the vote of a plurality or majority of his constituents. An individual legislator could disregard the wishes of the citizens of his district who may have voted overwhelmingly for a particular candidate, and could vote for the candidate receiving the smaller number of votes in the general election. Thus, there could be no assurance that a choice of even an overwhelming plurality of the people of this State would be respected by the General Assembly in its selection of the Governor. This fact was emphasized by the District Court

in holding the provisions of the Georgia Constitution to be unconstitutional.

> The Georgia election system in the constitutional provision now under consideration permits unequal treatment of the voters within the class of voters selected, and it cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. This would give greater weight to the votes of those citizens who voted for this candidate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored. . . . (R. 229-30).

This situation is further aggravated by the fact that all Democratic legislators, 229 out of 259, were required, as a condition of their participation in the Democratic primary, to pledge themselves to support the rules of the Democratic Executive Committee which include a requirement that they "support the nominee of the Democratic Party." (R. 148-49, 179). The validity of this rule is questionable as well as the degree of "support" required by it. Nonetheless it is considered by many to be binding, certainly in conscience, and to require, at the least, that the person taking it not vote for or support any nominee of the opposing party.[6] Thus the nine Democratic legislators from DeKalb County may very well feel obliged to vote for Lester Maddox, or possibly to refrain from

[6] The extent to which the pledge may bind the conscience of a legislator was dramatically illustrated in Georgia by the withdrawal from the general election of a Democratic Congressman who would not remain a candidate subject to the obligation to support the party nominee.

voting, in the General Assembly even though the people of DeKalb County voted overwhelmingly for Howard Callaway (R. 142, 152, 180).

This requirement thus taints the entire legislative election process and makes a fair selection by the members of the General Assembly impossible.

A. The Inequities Inherent In a Unit System of Election Are Greatly Aggravated by the Malapportionment of Both Houses of the General Assembly.

The extent to which the votes would be weighted and the will of the majority be disregarded in any election of the Governor by the General Assembly becomes even more apparent when its existing apportionment is considered.[7] Under the existing apportionment of the Georgia House, a mere 42 per cent of the population, under the 1960 United States Census, can elect an absolute majority of its 205 members. Based on the United States Census of 1960, more than two-thirds (143) of its members are elected from districts which deviate more than 10 per cent from average; almost one-half (96) are elected from districts which deviate more than 15 per cent, and more than one-third, or 71 representatives, are elected from districts which deviate more than 20 per cent from average. The largest house district has more than twice the population of the smallest. The disparities existing in the 54-seat Senate, while somewhat smaller, are equally invalid.

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[7] Even under an apportionment of districts within 15 per cent of average, 43.7 per cent of the population can control an absolute majority of legislative seats. See Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle For Fair Representation,* 63 Mich. L. Rev. 209, 215 (1964). While such disparities may be acceptable for purposes of legislation, they are not acceptable in the election of a Governor to represent all the people of the State.

Toombs v. *Fortson*, 241 F. Supp. 65 (N.D. Ga. 1965), *aff'd per curiam*, 384 U.S. 210 (1966). The disparities are even more extreme under the 1965 population estimates of the Georgia Department of Public Health. Thus, the largest house district now exceeds the smallest by more than 2.6 to 1, while the largest Senate district is now 1.86 times larger than the smallest. See Appendix *B, infra.*

When coupled with the unit rule of election, these disparities serve to distort still further the respective weights of votes cast in different counties. DeKalb County, for example, was carried by Howard Callaway by a margin of more than 2 to 1, 52,840 votes for Callaway as against 24,064 for Maddox. (R. 142, 152, 180). Yet, because DeKalb County is one of the most underrepresented areas in the State in both the House (-45%) and the Senate (-48%), the strength of this victory would be diminished in any election by the General Assembly. See Appendix *B, infra.* The converse also exists with respect to the weight of votes cast for the losing candidate in the overrepresented areas of the State. In Bulloch County, which is overrepresented by 44% in the House, not only would the votes cast for the losing candidate not be counted with votes cast in other areas, the effective weight of the votes cast for the prevailing candidate in Bulloch County would be exaggerated because of the county's overrepresentation, in any legislative selection of the Governor. See Appendix *B, infra.*

B. The Desire of the State to Elect Its Chief Executive by Majority Vote Does Not Justify Taking Away the Right of the People to An Equal Voice in the Selection of Their Governor, When Majority Support Can Be Achieved by Less Drastic Means Not Restrictive of Appellees' Rights.

The principal justification which has been offered by the State for the provision of the Georgia Constitution providing for the election of the Governor by the General Assembly, and indeed the only circumstance bringing these provisions into operation, is the desire of the State to select its Chief Executive by majority vote. The means selected by the Georgia Constitution are particularly inappropriate to achieve majority support for the Governor since, as previously noted and as emphasized by the District Court, the legislature is under no obligation to select the candidate having the highest number of popular votes in the general election.

This Court has repeatedly recognized that the means adopted by the State, as well as the ends, must be legitimate and must, so far as possible, be made to accommodate and not to infringe the basic rights of the people. See *Talley* v. *California,* 362 U.S. 60 (1960); *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354 (1951); *Thornhill* v. *Alabama,* 310 U.S. 88, 95-96 (1940). Indeed, Mr. Justice Stewart emphasized in *Shelton* v. *Tucker,* 364 U.S. 479 (1960):

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Id.* at 488.

And as Mr. Justice Brandeis observed, concurring in *Whitney* v. *California* 274 U.S. 357 (1927), an otherwise legitimate "measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." *Id.* at 377.

These decisions make clear the fact that even a legitimate desire on the part of the State to require a majority vote in the election of her Governor does not justify a denial of the basic rights of the citizens of Georgia to participate in the final election of their Chief Executive when majority rule may be accomplished more effectively by less drastic means. Indeed, the General Assembly, in adopting Section 34-1514 of the Election Code, has provided a less restrictive alternative which will insure that the next Governor of Georgia will enjoy the strength of popular support, without any invasion or denial of the basic right of the people of Georgia to select their Governor.[8] Thus, even if the State constitutional provision were otherwise valid, its unnecessary infringement of the right of the people of Georgia to vote in the final selection of their Governor requires its invalidation by this Court. *Shelton* v. *Tucker, supra.*

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[8] The unnecessary encroachment upon the doctrine of separation of powers expressed in the Georgia Constitution which would result from the selection of the Governor by the legislature would also be avoided. See Ga. Const., art. I, §1, para. XXIII.

II. THERE ARE NO LEGAL OBSTRUCTIONS TO THE ORDERLY CONCLUSION OF THE POPULAR ELECTION OF THE GOVERNOR OF GEORGIA BY A RUNOFF WHICH JUSTIFY A DENIAL OF EQUAL PROTECTION BY PERMITTING THE GENERAL ASSEMBLY TO ELECT THE GOVERNOR.

The appellant has urged that Article V, Section I, Paragraph IV of the Georgia Constitution of 1945 must not be declared invalid, because it provides the only legal and practical method of electing a Governor. Apart from the obvious irrelevance of this consideration to the fundamental question of the legality of the part of Article V, Section I, Paragraph IV which the District Court held invalid, the appellees submit that the Georgia Election Code provides a simple, orderly and traditional means for the completion of the election process, namely a runoff between the two candidates who received the highest number of votes. The only obstruction to the runoff has been the archaic constitutional provision invalidated by the court below. With this removed, there can be an orderly conclusion to the popular election without the problems conceived of by the appellant.

A. The Georgia Election Code Provides for a Runoff Under Present Circumstances.

The unqualified, unambiguous language of Section 34-1514 of the Georgia Election Code requires a runoff between the two candidates who received the highest number of votes at the polls on November 8, 1966, Lester G. Maddox and Howard H. Callaway. The General Assembly must be taken to have meant what it said, namely, that

> No candidate shall be nominated for public office *in any primary* or elected to public office *in any election* unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate shall have received a majority of the

votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes. . . . Ga. Code Ann. § 34-1514 (Ga. Laws 1964, Extra. Sess., pp. 26, 174-75). (Emphasis supplied).[9]

The appellant suggests that this section, despite its broad and all-inclusive language, is not applicable to a runoff in the Governor's race. The language of the section simply does not permit such an arbitrary application or limitation. The intent evident from the language is that the provision be applied whenever and wherever it can be applied, by its terms. It has been stipulated by the Secretary of State that Section 34-1514 was applied to require a runoff on September 28, 1966, to select the gubernatorial nominee of the Georgia Democratic Party where no candidate received a majority in the first primary. (R. 141-42, 179). Since the language of the section in referring to "any primary" admittedly includes a gubernatorial primary, it is difficult to conceive that the legislature did not intend "any election" to have coverage equally as broad.

Furthermore, the circumstances under which the 1964 Election Code, including Section 34-1514, was adopted are of critical significance in resolving the legislative objective of the runoff provision.

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[9] The Georgia Election Code provides that as used in the Code the word "election" means "*any* general or special election and shall not include a primary," Ga. Code Ann. § 34-103(e) (Ga. Laws 1964, Extra. Sess., pp. 26, 29), and that the words "public office" include "*every* Federal, *State* and county *office* to which persons can be elected by a vote of the electors under the laws of this State," Ga. Code Ann. § 34-103(y) (Ga. Laws 1964, Extra. Sess., pp. 26, 31). (Emphasis supplied.) These provisions remove any doubt that Section 34-1514 was intended to apply to the gubernatorial race.

In March of 1964, Governor Sanders called the General Assembly to an Extraordinary Session beginning on May 4, 1964, for the purposes, among others, of enacting what is now the Election Code and of approving a new constitution to submit to the people. Ga. Acts 1964, Extra. Sess., pp. 1-2. At the same time that the Election Code was being considered, the General Assembly approved a proposed constitution.[10] Section 7 of Article 4 of this proposed constitution, which is quoted in full in Appendix *A*, abolished the antiquated method of having the legislature elect the Governor if no candidate receives a majority. It provided for a runoff which would "be considered as a part of the election" and which would be held at such time as provided by law. That election also required transmission of one set of the returns of the election of the Governor and other executive officers to the General Assembly in language very similar to the language of Paragraph III of Article V, Section 1 of the present Georgia Constitution.

The objective of the proposed Section 7 is unmistakable. Preserving the old form of having one set of

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[10] The proposed constitution was approved by both houses of the Georgia General Assembly on June 23, 1964. Record, p. 179, Fortson v. Toombs, 379 U.S. 621 (1965). The Senate voted 43 to 9, and the House voted 152 to 16, in favor of submitting the proposed constitution. Ga. General Assembly, Senate Journal, 1964 Extra. Session 790; Ga. General Assembly, House Journal, 1964 Extra. Session 1115.

The Election Code was passed by both houses of the General Assembly on June 22, 1964. The Senate voted 47 to 0, and the House voted 150 to 27, in favor of the Election Code. Ga. General Assembly, Senate Journal, 1964 Extra. Session 744; Ga. General Assembly, House Journal, 1964 Extra. Session 1088. The Governor signed the Election Code on June 24, 1964. Ga. Acts 1964, Extra. Sess., pp. 26, 220.

sealed election returns reviewed and approved by the General Assembly, the proposed constitution retained the requirement of a majority vote to elect and provided (1) that a runoff would be used in case no candidate received a majority, (2) that the runoff would be considered a part of the election, and (3) that a special election would be held if no candidate were elected in the election (as would occur, for example, if after the election and before the runoff, which would be considered part of the election under the proposed constitution, one or both of the two runoff candidates should die) or if the elected candidate died or withdrew.

These provisions of the proposed constitution correlate with Sections 34-1514 and 34-1515 of the Election Code, and show that these sections and other relevant provisions of the Election Code were enacted by the General Assembly at the 1964 Extraordinary Session to carry out the scheme for electing the Governor prescribed by the proposed constitution.[11]

When the Election Code was adopted, therefore, the General Assembly was not acting, presumptively or in fact, with reference to the invalid part of the present constitution which requires the General Assembly to choose the Governor if no candidate receives a majority. Moreover, without the invalid provision, the pres-

[11] Section 34-1515 provides as follows: Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a runoff primary or election, or whenever any person elected to public office shall die or withdraw prior to taking office, then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position. Ga. Code Ann. § 34-1515 (Ga. Laws 1964, Extra. Sess., pp. 26, 175).

ent constitution is very similar to the basic provisions of Section 7 of Article 4 of the proposed constitution.[12]

B. The Effectiveness of a Runoff in Concluding the Election Cannot Be Defeated by Write-In Votes.

The appellant has raised the question whether write-in voting would be allowed in a runoff. This is done in an attempt to cast doubt on the ability of a runoff to achieve the majority vote required by Georgia law, with the suggestion that election by the General Assembly is the only way to achieve that result.[13]

It is inherent in the nature of a runoff that it restricts the list of candidates in order to bring an election to a conclusion and yet have a selection by majority vote. A runoff is thus quite different from a "rerun" or a new election in which all of the same candidates and others may appear on the ballot.

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[12] The fate of the proposed constitution is a familiar story to this Court. On the day before the Extraordinary Session ended on June 25, 1964, the United States District Court for the Northern District of Georgia entered an order enjoining the submission of the proposed constitution to the people in the November, 1964 election. Part of this order which is not relevant here was changed on November 3, 1964. This Court noted probable jurisdiction on October 12, 1964, *Fortson* v. *Toombs*, 379 U.S. 809 (1964). The case was argued on November 18 and 19, 1964. In January, well after the November election, this Court vacated the District Court's order in relevant part and remanded the case. *Fortson* v. *Toombs*, 379 U.S. 621 (1965), *vacating and remanding an unreported order of the district court.* See *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962).

[13] The appellant could also have noted that the right of a legislator to respond "present" and refrain from voting could frustrate election by the General Assembly under the constitutional provision here involved which provides that "a majority of the members present shall be necessary to a choice." Ga. Const., art. V, § I, para. IV.

This is recognized in Section 34-1514 of the Georgia Election Code which states the requirement of a majority to elect and provides that the runoff shall be "between the two candidates receiving the highest number of votes" in the election which failed to produce the majority. Ga. Code Ann. § 34-1514 (Ga. Laws 1964, Extra. Sess., pp. 26, 174). The purpose of the statutory provision is to establish a practical and convenient method for obtaining a majority vote for one candidate. The language and logic of the runoff statute clearly excludes consideration of votes for any candidate other than the two who formerly received the highest number of votes. If Section 34-1514 were read to permit write-in voting for other candidates, it would not be "between the two candidates receiving the highest number of votes," *ibid.*, and there would be no way to be sure that the runoff would accomplish its intended result of producing a majority vote for one candidate. See *Cunningham* v. *Queen,* 96 S.W. 2d 798 (Ct. Civ. App. Tex. 1936), where the court, holding that write-in voting should not be recognized in a runoff primary, emphasized that

> Before a person is entitled to be voted for, for an office in the run-off primary, he must have been one of the two high candidates at the first primary. If this were not true, it is very likely that neither candidate would receive a majority. If voters were left free to write in the name of any person they might choose in the run-off primary, there could very easily, and probably would, not be a majority for any candidate in the second primary, and thus the requirements of the law, that before a candidate can become the party nominee he must have received a majority of the votes, would prevent the party from making a nomination. *Id.* at 800.

Even if merit could be found in the appellant's argument that Section 34-1514 is not applicable so as to require a runoff in this situation, that does not mean that resort must be had to the legislature in order to provide a Governor.[14] The policy of the State of Georgia as expressed in its Constitution and laws is for election by majority vote. This applies to the Governor as to all other elected officials. The Georgia constitutional provision here involved provides for completion of the election by the legislature if no candidate receives a majority in the election for Governor. If that provision is held invalid, the appellees are entitled to relief in a form most nearly in conformity with the valid policies of the state, *i.e.*, a runoff election. Machinery for runoffs is provided in Georgia law. A runoff has been held in the process of nominating one of the candidates for Governor this year. This Court can and should order the District Court, in the exercise of its equity powers and in order to provide full relief to appellees, to order a runoff election to be held between Maddox and Callaway at the earliest possible date and to make such additional parties as may be necessary to effectuate this order.[15]

In summary, therefore, it is evident that Georgia law provides a valid and convenient means of choosing a Governor. The District Court has retained juris-

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[14] As this Court has repeatedly recognized, the federal courts possess a wide range of equity powers in moulding their decrees. *Fortson* v. *Toombs*, 379 U.S. 621, 622 (1965).

[15] *Reynolds* v. *Sims*, 377 U.S. 533, 585-87 (1964); and see *Smiley* v. *Holm*, 283 U.S. 355, 374-75 (1932), in which this Court framed a decree requiring the at-large election of Congressmen in Minnesota where it found the existing apportionment act to be invalid.

diction of this case "for such other and further proceedings as may be deemed equitable and just." (R. 232). With the removal of the obstruction posed by the invalid part of Article V, Section I, Paragraph IV of the Georgia Constitution, the manner in which the Governor of Georgia must be elected is clearly delineated and can readily be provided for by this Court and the District Court on remand in steps voluntarily taken by the appellant, with Court approval, or ordered by the Court, to carry out the purposes of the provisions of Section 34-1514 affording a runoff.

III. REMEDIES REQUESTED TO DO JUSTICE UNDER PRESENT CIRCUMSTANCES.

The completion of the Georgia gubernatorial election, which is the function of the runoff, should proceed as rapidly as the mechanics—printing ballots, sending out absentee ballots and the like—will permit. The people of the State, as well as the candidates themselves and their organizations, should not be asked to "stand at the ready" any longer than absolutely necessary for the proper conduct of a runoff to complete the election. This is particularly significant under present circumstances since the newly elected General Assembly convenes on January 9, 1967 and, with a session of only forty-five days, must address itself promptly to a legislative program. Among the significant decisions which the new Governor must make and acts that he must perform early in his administration are the following:

(1) Propose to the General Assembly a budget of approximately 1.6 billion covering the operations of the State of Georgia for the next two fiscal years end-

ing June 30, 1969, a date more than half way through the term of the new Governor.

(2) Submit his legislative program to the General Assembly.

(3) Advise the General Assembly as to whether he will ask it to undertake consideration for reapportionment during the thirty-day regular session or will call a later special session for this purpose so as to provide action before May 1, 1967 as required in *Toombs* v. *Fortson,* 241 F. Supp. 65 (N.D. Ga. 1965).

(4) Select many important officials, including a Revenue Commissioner, a Budget Director, a director of the Department of Family and Children's Services, and two members of the Board of Regents.

(5) Undertake promptly the carrying out of the man other significant responsibilities of a Governor, including the selection of his own key staff members.

The effectiveness of the new Chief Executive's services to the State can be greatly impaired if he is retarded or delayed in taking office.

We are appreciative of the fact that our feeling of need for acting without delay has been shared by the Attorney General of Georgia as indicated not only in his written statements to this Court but also by his cooperation in moving the case as expeditiously as he feels possible. In his application to this Court for a stay he says:

> Appellant will and does move the Court to advance and expedite this case, including emergency session if the Court deems it necessary, so that the stay herein sought pending appeal will be of minimum duration, so that the appeal may be heard

and determined at the earliest possible moment, and so that the election of a Governor of Georgia may be accomplished by proper means in the first instance and at the earliest opportunity.

We join in this request to the Court and we respectfully note, with great appreciation, the arrangements made by the Court to consider this case with such unusual expedition.

In order to accomplish in a meaningful way the ends sought by the appellees on behalf of themselves and all eligible voters in Georgia, we submit that the practicalities of the situation require that this Court give such direction to the District Court as to permit it, with the cooperation that we feel confident the Secretary of State and the Attorney General will provide, to order that a runoff be conducted, at the earliest practicable date, confined to the two candidates receiving the highest number of votes in the election on November 8, 1966.

CONCLUSION

We respectfully ask the Court to do the following:

1. Affirm the judgment of the court below for the reasons set forth in the District Court's opinion and for the further reasons set forth in this brief.

2. To direct the District Court to order a runoff of the gubernatorial election confined to the two candidates receiving the highest number of votes in the election of November 8, 1966, to be held on the earliest practicable date, determined after conferring with the parties, and to add such parties, namely Ordinaries of the State as a class, as may be necessary to accomplish the relief.

3. To grant such other relief as is incidental to the foregoing.

Respectfully submitted,

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APPENDIX A

Georgia Constitutional Provision in Question

Paragraph IV of Article V, Section I of the Georgia Constitution provides:

> How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State;

Ga. Const., Art. V, § I, para. IV.

Relevant Provisions of the Georgia Election Code

Section 34-103(e) and 34-103(y) of the Georgia Election Code provide:

> *Definition.* —The following words, when used in this Code, shall have the following meanings, unless otherwise clearly apparent from the context:
>
> . . . .
>
> (e) The word "election" shall mean any general or special election and shall not include a primary;
>
> . . . .
>
> (y) The words "public office" shall include every Federal, State and county office to which persons can be elected by a vote of the electors under the laws of this State;
>
> . . . .

Ga. Const., art. V, § I, para. IV.
Sess., pp. 26, 29, 31).

Section 34-1514 of the Georgia Election Code provides:

> *Majority vote required to nominate or elect; exception; runoff primary or election.*—No candidate shall be nominated for public office in any primary or

elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office. In instances where no candidate receives a majority of the votes cast, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes, on the fourteenth day after the day of holding the first primary or election, unless such runoff date is postponed by court order. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624. The State executive committee of a political party holding a runoff primary in an area involving two or more counties shall make prior arrangement for financing the cost of holding same. The provisions of this Section shall not apply to candidates seeking party nomination for or election to the governing authority of a county during the year 1964, and such candidate shall be nominated in the manner prescribed by the rules of the county executive committee of his county in the case of a primary, and by the provisions of any local act establishing such governing authority in the case of an election; and this sentence shall be automatically repealed on January 1, 1965. Ga. Code Ann. § 34-1514 (Ga. Laws 1964, Extra. Sess., p. 26).

Proposed Constitution of Georgia of 1964

Section 7 of Article 4 of the Proposed Constitution of Georgia of 1964 provides:

SECTION 7.

ELECTIONS

Paragraph 1. Election of Executive Officers. The first election for Governor, Lieutenant Governor, Secretary of State, Attorney General, Comptroller General, Treasurer, State School Superintendent, Com-

missioner of Agriculture, and Commissioner of Labor under this Constitution shall be held at the time of the General Election in 1966 and quadrennially thereafter on the date fixed by law. All such officers shall be elected in the manner prescribed for the election of members of the General Assembly and such officers shall be installed in office at the next regular annual session of the General Assembly subsequent to their election.

Paragraph 2. Returns of Elections. The returns for every election of said officers shall be sealed by the managers, separately from other returns, and directed to the President of the Senate and Speaker of the House of Representatives, and transmitted to such person or authority as provided by law, who shall, without opening said returns, cause the same to be laid before the Senate on the day after the two houses shall have been organized, and they shall be transmitted by the Senate to the House of Representatives.

Paragraph 3. Publication of Returns. The members of both houses of the General Assembly shall convene in the Representative Hall, and the President of the Senate and the Speaker of the House of Representatives shall open and publish the returns under the direction of the General Assembly. The person having the majority of the whole number of votes shall be declared duly elected to each of said offices. Whenever no person is elected in the general election to fill any such office, or whenever any person elected shall die or withdraw prior to taking any such office, the Secretary of State shall call a special election, which shall be held not less than sixty nor more than one hundred twenty days from the date of any such event, to fill such position. The incumbent office shall continue to serve until his successor can be elected and qualified.

Paragraph 4. Runoffs. Whenever a runoff is required under this Constitution or under any valid law, the runoff shall be considered as a part of the election and may be held at such time after the date prescribed in this Constitution for the election as is fixed by law.

Ga. Laws 1964, Extra. Sess., pp. 234, 285-86.

APPENDIX B

1965 APPORTIONMENT OF HOUSE OF REPRESENTATIVES — SUMMARY DATA

	1965	1960
Number of Representatives	205	205
Total population	4,263,000	3,942,966
Average population per Representative	20,795	19,234
Smallest population represented by one Representative	11,550	12,131
Largest population represented by one Representative	30,180	23,860
Ratio of largest population per Representative to smallest population per Representative	2.61:1	1.97:1
Maximum deviation of population per Representative below average	44%	37%
Maximum deviation of population per Representative above average	45%	24%
Minimum percentage of population represented by a majority (103) of the Representatives	41.2%	42.3%
Number of Representatives representing the 20% of population residing in least populous districts	56	54
Number of Representatives representing the 20% of population residing in most populous districts	30	34
Percentage of Representatives from districts deviating 20% or more from the average	45%	37%
Percentage of Representatives from districts deviating 15% or more from the average	55%	58%
Percentage of Representatives from districts deviating 10% or more from the average	74%	70%

NOTE:

1960 population data is based on the 1960 U. S. census.

1965 population data is based on estimates compiled by the Georgia Department of Public Health.

APPENDIX B, TABLE I

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 12,500 or less								
89	Decatur	2	11,550	12,601	(1,051)	23,100	25,203	(2,103)
56	Webster-Stewart-Chattahoochee	1	12,200*	23,487	(11,287)	12,200*	23,487	(11,287)
		3				35,300	48,690	(13,390)
Districts of 12,500 - 13,000								
64	Bulloch	2	12,750	12,131	619	25,500	24,263	1,237
68	Sumpter	2	12,800	12,326	474	25,600	24,652	948
		4				51,100	48,915	2,185
Districts of 13,000 - 13,500								
	None							
Districts of 13,500 - 14,000								
61	Quitman-Randolph	1	13,600	13,510	90	13,600	13,510	90
18	Franklin	1	13,700	13,274	426	13,700	13,274	426
86	Early	1	13,700	13,151	549	13,700	13,151	549
21	Paulding	1	13,900	13,101	799	13,900	13,101	799
72	Ben Hill	1	13,900	13,633	267	13,900	13,633	267
		5				68,800	66,669	2,131
Districts of 14,000 - 14,500								
4	Fannin	1	14,000	13,620	380	14,000	13,620	380
48	Johnson-Washington	2	14,000	13,475	525	28,000	26,951	1,049
74	Appling	1	14,000	13,246	754	14,000	13,246	754
57	Taylor-Marion	1	14,100	13,788	312	14,100	13,788	312
63	Candler-Evans	1	14,300	13,624	676	14,300	13,624	676
87	Miller-Seminole	1	14,400	13,710	690	14,400	13,710	690
		7				98,800	94,939	3,861

* The 1965 estimate does not include military population.

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 14,500 - 15,000								
5	Union-Lumpkin	1	14,600	13,751	849	14,600	13,751	849
30	Oconee-Oglethorpe	1	14,700	14,230	470	14,700	14,230	470
41	Columbia	1	14,700	13,423	1,277	14,700	13,423	1,277
20	Polk	2	14,850	14,007	843	29,700	28,015	1,685
		5				73,700	69,419	4,281
Districts of 15,000 - 15,500								
26	Haralson	1	15,100	14,543	557	15,100	14,543	557
46	Jasper-Jones	1	15,100	14,603	497	15,100	14,603	497
69	Crisp-Dooly	2	15,100	14,621	479	30,200	29,242	958
23	Barrow	1	15,200	14,485	715	15,200	14,485	715
55	Screven	1	15,300	14,919	381	15,300	14,919	381
		6				90,900	87,792	3,108
Districts of 15,500 - 16,000								
50	Burke-Jenkins	2	15,500	14,872	628	31,000	29,744	1,256
19	Hart	1	15,700	15,229	471	15,700	15,229	471
99	Brooks	1	15,700	15,292	408	15,700	15,292	408
		4				62,400	60,265	2,135
Districts of 16,000 - 16,500								
95	Lowndes	3	16,033	16,423	(390)	48,100	49,270	(1,170)
14	Bartow	2	16,400	14,133	2,267	32,800	28,267	4,533
84	Pierce-Brantley	1	16,400	15,569	831	16,400	15,569	831
		6				97,300	93,106	4,194

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 16,500 - 17,000								
98	Charlton-Camden	1	16,500	15,288	1,212	16,500	15,288	1,212
94	Colquitt	2	16,550	17,024	(474)	33,100	34,048	(948)
60	Laurens	2	16,750	16,156	594	33,500	32,313	1,187
78	Clay-Calhoun-Baker	1	16,800	16,435	365	16,800	16,435	365
10	Dawson-Forsyth	1	16,900	15,760	1,140	16,900	15,760	1,140
		7				116,800	113,844	2,956
Districts of 17,000 - 17,500								
58	Schley-Macon	1	17,000	16,426	574	17,000	16,426	574
70	Dodge	1	17,100	16,483	617	17,100	16,483	617
65	Effingham-Bryan	1	17,300	16,370	930	17,300	16,370	930
		3				51,400	49,279	2,121
Districts of 17,500 - 18,000								
83	Ware	2	17,550	17,109	441	35,100	34,219	881
47	Baldwin	2	17,600	17,032	568	35,200	34,064	1,136
80	Worth	1	17,600	16,682	918	17,600	16,682	918
62	Toombs	1	17,900	16,837	1,063	17,900	16,837	1,063
16	Hall	3	17,933	16,579	1,354	53,800	49,739	4,061
		9				159,600	151,541	8,059
Districts of 18,000 - 18,500								
27	Douglas	1	18,000	16,741	1,259	18,000	16,741	1,259
44	Pike-Lamar	1	18,000	17,378	622	18,000	17,378	622
49	Jefferson	1	18,100	17,468	632	18,100	17,468	632
53	Twiggs-Wilkinson	1	18,200	17,185	1,015	18,200	17,185	1,015
33	Heard-Coweta	2	18,250	17,113	1,137	36,500	34,226	2,274

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 18,000 - 18,500 (Continued)								
61	Treutlen-Wheeler-Montgomery	1	18,300	17,500	800	18,300	17,500	800
17	Banks-Madison	1	18,400	17,743	657	18,400	17,743	657
91	Jeff Davis-Bacon	1	18,400	17,273	1,127	18,400	17,273	1,127
92	Thomas	2	18,450	17,159	1,291	36,900	34,319	2,581
		11				200,800	189,833	10,967
Districts of 18,500 - 19,000								
25	Elbert	1	18,500	17,835	665	18,500	17,835	665
39	Hancock-Putnam	1	18,500	17,777	723	18,500	17,777	723
81	Turner-Irwin	1	18,500	17,650	850	18,500	17,650	850
54	Emanuel	1	18,700	17,815	885	18,700	17,815	885
71	Pulaski-Bleckley	1	18,700	17,846	854	18,700	17,846	854
9	Gilmer-Pickens	1	18,800	17,825	975	18,800	17,825	975
90	Grady	1	18,800	18,015	785	18,800	18,015	785
100	Harris-Talbot	1	18,800	18,294	506	18,800	18,294	506
36	Henry	1	18,900	17,619	1,281	18,900	17,619	1,281
		9				168,200	160,676	7,524
Districts of 19,000 - 19,500								
12	Stephens	1	19,300	18,391	909	19,300	18,391	909
11	Habersham	1	19,400	18,116	1,284	19,400	18,116	1,284
34	Spalding	2	19,400	17,702	1,698	38,800	35,404	3,396
77	Wayne	1	19,400	17,921	1,479	19,400	17,921	1,479
		5				96,900	89,832	7,068

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 19,500 - 20,000								
24	Jackson	1	19,500	18,499	1,001	19,500	18,499	1,001
76	Liberty-McIntosh	1	19,500	20,851	(1,351)	19,500	20,851	(1,351)
32	Carroll	2	19,550	18,225	1,325	39,100	36,451	2,649
67	Terrell-Lee	1	19,800	18,946	854	19,800	18,946	854
		5				97,900	94,747	3,153
Districts of 20,000 - 20,500								
1	Dade-Walker	3	20,000	17,976	2,024	60,000	53,930	6,070
6	Towns-Rabun-White	1	20,000	18,929	1,071	20,000	18,929	1,071
45	Butts-Monroe	1	20,000	19,471	529	20,000	19,471	529
43	Meriwether	1	20,200	19,756	444	20,200	19,756	444
73	Wilcox-Telfair	1	20,400	19,620	780	20,400	19,620	780
		7				140,600	131,706	8,894
Districts of 20,500 - 21,000								
8	Gordon	1	20,500	19,228	1,272	20,500	19,228	1,272
31	Taliaferro-Wilkes-Lincoln	1	20,600	20,237	363	20,600	20,237	363
52	Crawford-Peach	1	20,700	19,662	1,038	20,700	19,662	1,038
3	Whitfield-Murray	3	20,833	17,518	3,315	62,500	52,556	9,944
79	Dougherty	4	20,850	18,920	1,930	83,400	75,680	7,720
113-116	Chatham	9	20,889	20,922	(33)	188,000	188,299	(299)
88	Mitchell	1	20,900	19,652	1,248	20,900	19,652	1,248
		20				416,600	395,314	21,286

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 21,000 - 21,500								
7	Chattooga	1	21,100	19,954	1,146	21,100	19,954	1,146
75	Tattnall-Long	1	21,100	19,711	1,389	21,100	19,711	1,389
97	Lanier-Atkinson-Clinch-Echols	1	21,200	19,706	1,494	21,200	19,706	1,494
		3				63,400	59,371	4,029
Districts of 21,500 - 22,000								
28	Walton	1	21,600	20,481	1,119	21,600	20,481	1,119
59	Houston	2	21,700	19,577	2,123	43,400	39,154	4,246
110-112	Muscogee	7	21,871	22,660	(789)	153,100	158,623	(5,523)
		10				218,100	218,258	(158)
Districts of 22,000 - 22,500								
38	Greene-Morgan	1	22,100	21,473	627	22,100	21,473	627
37	Newton	1	22,200	20,991	1,209	22,200	20,991	1,209
		2				44,300	42,464	1,836
Districts of 22,500 - 23,000								
2	Catoosa	1	22,800	21,101	1,699	22,800	21,101	1,699
104-106	Richmond	6	22,800	22,600	200	136,800	135,601	1,199
		7				159,600	156,702	2,898
Districts of 23,000 - 23,500								
42	Troup	2	23,100	23,594	(494)	46,200	47,189	(989)
29	Clarke	2	23,250	22,681	569	46,500	45,363	1,137
82	Coffee	1	23,300	21,953	1,347	23,300	21,953	1,347
		5				116,000	114,505	1,495

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 23,500 - 24,000								
13	Floyd	3	23,567	23,043	524	70,700	69,130	1,570
40	McDuffie-Glascock-Warren	1	23,700	22,659	1,041	23,700	22,659	1,041
		4				94,400	91,789	2,611
Districts of 24,000 - 24,500								
	None							
Districts of 24,500 - 25,000								
15	Cherokee	1	24,500	23,001	1,499	24,500	23,001	1,499
107-109	Bibb	6	24,600	23,541	1,059	147,600	141,249	6,351
51	Upson	1	24,800	23,800	1,000	24,800	23,800	1,000
35	Fayette-Clayton	3	24,867	18,188	6,679	74,600	54,564	20,036
120—3 121—3 122—3 123—3 124—3 125—3 126—3 127—3	Fulton (21 elected by District—3 in County at large)	24	24,971	23,180	1,791	599,300	556,326	42,974
		35				870,800	798,940	71,860
Districts of 25,000 - 25,500								
93	Tift	1	25,100	23,487	1,613	25,100	23,487	1,613
96	Berrien-Cook	1	25,100	23,860	1,240	25,100	23,860	1,240
		2				50,200	47,347	2,853

District Number	Counties	Number of Representatives	Average Population Per Representative			Total Population		
			Estimated 1965	Actual 1960	Increase (Decrease)	Estimated 1965	Actual 1960	Increase (Decrease)
Districts of 25,500 or more								
85	Glynn	2	25,900	20,977	4,923	51,800	41,954	9,846
22	Gwinnett	2	27,300	21,770	5,530	54,600	43,541	11,059
117—4	DeKalb	12	30,150	22,280	7,870	361,800	267,354	94,446
118—4	Rockdale							
119—4		5	30,180	22,831	7,349	150,900	114,174	36,726
101-103	Cobb	21				619,100	467,023	152,077
		205				4,263,000	3,942,966	320,034

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average		Increase (Decrease)
		1965	1960	
Districts of 12,500 or less				
	2	—44%	—35%	(9%)
89	1	—41*	+23	(64)
56	3			
Districts of 12,500 - 13,000				
	2	—39	—37	(2)
64	2	—38	—36	(2)
68	4			
Districts of 13,000 - 13,500				
None				
Districts of 13,500 - 14,000				
61	1	—35	—30	(5)
18	1	—34	—31	(3)
86	1	—34	—32	(2)
21	1	—33	—32	(1)
72	1	—33	—29	(4)
	5			
Districts of 14,000 - 14,500				
4	1	—33	—29	(4)
48	2	—33	—30	(3)
74	1	—33	—31	(2)
57	1	—32	—28	(4)
63	1	—31	—29	(2)
87	1	—31	—29	(2)
	7			

* The 1965 estimate does not include military population.

APPENDIX B, TABLE II

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 14,500 - 15,000				
5	1	—30%	—29%	(1%)
30	1	—29	—26	(3)
41	1	—29	—30	1
20	2	—29	—27	(2)
	5			
Districts of 15,000 - 15,500				
26	1	—27	—24	(3)
46	1	—27	—24	(3)
69	2	—27	—24	(3)
23	1	—27	—25	(2)
55	1	—26	—22	(4)
	6			
Districts of 15,500 - 16,000				
50	2	—25	—25	.....
19	1	—25	—21	(4)
99	1	—25	—21	(4)
	4			
Districts of 16,000 - 16,500				
95	3	—23	—15	(8)
14	2	—21	—27	6
84	1	—21	—19	(2)
	6			

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 16,500 - 17,000				
98	1	—21%	—21%	—%
94	2	—20	—12	(8)
60	2	—19	—16	(3)
78	1	—19	—15	(4)
10	1	—19	—18	(1)
	7			
Districts of 17,000 - 17,500				
58	1	—18	—15	(3)
70	1	—18	—14	(4)
65	1	—17	—15	(2)
	3			
Districts of 17,500 - 18,000				
83	2	—16	—11	(5)
47	2	—15	—12	(3)
80	1	—15	—13	(2)
62	1	—14	—13	(1)
16	3	—14	—14	—
	9			
Districts of 18,000 - 18,500				
27	1	—13	—13	—
44	1	—13	—10	(3)
49	1	—13	— 9	(4)
53	1	—12	—11	(1)
33	2	—12	—11	(1)

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 18,000 - 18,500 (Continued)				
61	1	—12%	— 9%	(3%)
17	1	—12	— 8	(4)
91	1	—12	—10	(2)
92	2	—11	—11	—
	11			
Districts of 18,500 - 19,000				
25	1	—11	— 7	(4)
39	1	—11	— 8	(3)
81	1	—11	— 8	(3)
54	1	—10	— 7	(3)
71	1	—10	— 7	(3)
9	1	—10	— 7	(3)
90	1	—10	— 6	(4)
100	1	—10	— 5	(5)
36	1	— 9	— 8	(1)
	9			
Districts of 19,000 - 19,500				
12	1	— 7	— 4	(3)
11	1	— 7	— 6	(1)
34	2	— 7	— 8	1
77	1	— 7	— 7	—
	5			

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 19,500 - 20,000				
24	1	—6%	—4%	(2%)
76	1	—6	+8	(14)
32	2	—6	—5	(1)
67	1	—5	—2	(3)
	5			
Districts of 20,000 - 20,500				
1	3	—4	—7	3
6	1	—4	—2	(2)
45	1	—4	+1	(5)
43	1	—3	+3	(6)
73	1	—2	+2	(4)
	7			
Districts of 20,500 - 21,000				
8	1	—1	—	(1)
31	1	—1	+5	(6)
52	1	—	+2	(2)
3	3	—	—9	9
79	4	—	—2	2
113-116	9	—	+9	(9)
88	1	+1	+2	(1)
	20			

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 21,000 - 21,500				
7	1	+ 1%	+ 4%	(3%)
75	1	+ 1	+ 3	(2)
97	1	+ 2	+ 2	—
	3			
Districts of 21,500 - 22,000				
28	1	+ 4	+ 7	(3)
59	2	+ 4	+ 2	2
110-112	7	+ 5	+18	(13)
	10			
Districts of 22,000 - 22,500				
38	1	+ 6	+12	(6)
37	1	+ 7	+ 9	(2)
	2			
Districts of 22,500 - 23,000				
2	1	+10	+10	—
104-106	6	+10	+18	(8)
	7			
Districts of 23,000 - 23,500				
42	2	+11	+23	(12)
29	2	+12	+19	(7)
82	1	+12	+14	(2)
	5			

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 23,500 - 24,000				
13	3	+13%	+20%	(7%)
40	1	+14	+18	(4)
	4			
Districts of 24,000 - 24,500				
None				
Districts of 24,500 - 25,000				
15	1	+18	+20	(2)
107-109	6	+18	+22	(4)
51	1	+19	+24	(5)
35	3	+20	— 5	25
120—3 121—3 122—3 123—3 124—3 125—3 126—3 127—3	24	+20	+21	(1)
	35			
Districts of 25,000 - 25,500				
93	1	+21	+22	(1)
96	1	+21	+24	(3)
	2			

District Number	Number of Representatives	Percentage of Population Per Representative in District Below or Above Average 1965	1960	Increase (Decrease)
Districts of 25,500 or more				
85	2	+25%	+ 9%	16%
22	2	+31	+13	18
117—4 118—4 119—4	12	+45	+16	29
101-103	5	+45	+19	26
	21			
	205			

1965 APPORTIONMENT OF SENATE — SUMMARY DATA

	1965	1960
Number of Senate Districts	54	54
Total population	4,263,000	3,942,966
Average population per District	78,944	73,018
Smallest District represented by one Senator	62,667	52,572
Largest District represented by one Senator	116,800	95,032
Ratio of population of largest District to smallest District	1.86:1	1.81:1
Maximum deviation of population per Senator above average	48%	30%
Maximum deviation of population per Senator below average	21%	28%
Minimum percentage of population represented by a majority (28 out of 54 or 51.9%) of the Senators	46.6%	49%
Number of Senators representing the 20% of population residing in least populous districts	13	12
Number of Senators representing the 20% of population residing in most populous districts	9	9
Number of districts (by percentage) deviating 20% or more from the average	15%	4%
Number of districts (by percentage) deviating 15% or more from the average	19%	11%
Number of districts (by percentage) deviating 10% or more from the average	33%	31%

NOTES:

(1) 1960 population data is based on the 1960 U.S. census.

1965 population data is based on estimates compiled by the Georgia Department of Public Health.

(2) For 1965, in the case of a county having more than one district, the amount given as population per district is the population of that county divided by the number of districts in the county.

APPENDIX B, TABLE III

District Numbers	Counties	Number of Senators	Total Population			Average Population Per Senator			Percentage of Population Per Senator Below or Above Average		
			Estimate 1965	Actual 1960	Increase (Decrease)	Estimate 1965	Actual 1960	Increase (Decrease)	1965	1960	Increase (Decrease)
Districts of 66,000 or below											
1, 2, 3	Chatham	3	188,000	188,299	(299)	62,667	62,766	(99)	—21%	—15%	(6%)
14	Chattahoochee-Stewart-Quitman, Randolph-Webster-Terrell, Sumpter*	1	64,700	74,533	(9,833)	64,700	74,533	(9,833)	—18	1	(19)
		4	252,700	262,832	(10,132)						
Districts of 66,000 - 68,000											
47	Elbert-Franklin-Hart-Stephens	1	67,200	64,729	2,471	67,200	64,729	2,471	—15	—11	(4)
21	Burke-Emanuel-Jenkins-Jefferson	1	67,800	65,027	2,773	67,800	65,027	2,773	—14	—11	(3)
		2	135,000	129,756	5,244						
Districts of 68,000 - 70,000											
11	Calhoun-Clay-Decatur-Baker, Miller-Seminole-Early	1	68,000	68,499	(499)	68,000	68,499	(499)	—14	— 7	(7)
19	Bleckley-Pulaski-Wilcox-Dodge, Telfair-Dooly	1	68,000	65,423	2,577	68,000	65,423	2,577	—14	—11	(3)
22, 23	Richmond	2	136,800	135,601	1,199	68,400	67,800	600	—13	— 8	(5)
45	Jasper-Morgan-Newton-Putnam, Walton	1	68,900	65,693	3,207	68,900	65,693	3,207	—13	—10	(3)
		5	341,700	335,216	6,484						
Districts of 70,000 - 72,000											
24	Columbia-Glascock-Lincoln-Wilkes, Taliaferro-Warren-McDuffie, Greene	1	70,400	67,512	2,888	70,400	67,512	2,888	—11	— 8	(3)
52	Floyd	1	70,700	69,130	1,570	70,700	69,130	1,570	—10	— 5	(5)
29	Heard-Troup-Meriwether	1	71,900	72,278	(378)	71,900	72,278	(378)	— 9	— 1	(8)
		3	213,000	208,920	4,080						

*The 1965 estimate does not include military population.

District Numbers	Counties	Number of Senators	Total Population			Average Population Per Senator			Percentage of Population Per Senator Below or Above Average		
			Estimate 1965	Actual 1960	Increase (Decrease)	Estimate 1965	Actual 1960	Increase (Decrease)	1965	1960	Increase (Decrease)
Districts of 72,000 - 74,000											
7	Clinch-Coffee-Atkinson-Ware	1	72,200	68,903	3,297	72,200	68,903	3,297	— 9%	— 6%	(3%)
18	Crawford-Houston-Peach-Twiggs	1	72,600	66,751	5,849	72,600	66,751	5,849	— 8	— 9	1
46	Clarke-Oconee-Oglethorpe-Madison	1	72,900	70,839	2,061	72,900	70,839	2,061	— 8	— 3	(5)
26, 27	Bibb	2	147,600	141,249	6,351	73,800	70,624	3,176	— 7	— 3	(4)
9	Brooks-Colquitt-Tift	1	73,900	72,827	1,073	73,900	72,827	1,073	— 6	.....	(6)
		6	439,200	420,569	18,631						
Districts of 74,000 - 76,000											
17	Harris-Talbot-Taylor-Marion-Schley, Macon-Upson	1	74,700	72,300	2,400	74,700	72,300	2,400	— 5	— 1	(4)
13	Lee-Worth-Irwin-Turner-Crisp-Ben Hill	1	74,900	71,937	2,963	74,900	71,937	2,963	— 5	— 1	(4)
32, 33	Cobb	2	150,900	114,174	36,726	75,450	57,087	18,363	— 4	—22	18
		4	300,500	258,411	42,089						
Districts of 76,000 - 78,000											
15, 16	Muscogee	2	153,100	158,623	(5,523)	76,550	79,311	(2,761)	— 3	9	(12)
10	Grady-Thomas-Mitchell	1	76,600	71,986	4,614	76,600	71,986	4,614	— 3	— 1	(2)
31	Polk-Paulding-Haralson-Douglas	1	76,700	72,400	4,300	76,700	72,400	4,300	— 3	— 1	(2)
28	Spalding-Butts-Pike-Lamar-Monroe	1	76,800	72,253	4,547	76,800	72,253	4,547	— 3	— 1	(2)
51	Bartow-Gordon-Cherokee	1	77,800	70,496	7,304	77,800	70,496	7,304	— 1	— 3	2
		6	461,000	445,758	15,242						

District Numbers	Counties	Number of Senators	Total Population			Average Population Per Senator			Percentage of Population Per Senator Below or Above Average		
			Estimate 1965	Actual 1960	Increase (Decrease)	Estimate 1965	Actual 1960	Increase (Decrease)	1965	1960	Increase (Decrease)
Districts of 78,000 - 80,000											
20	Laurens-Johnson-Treutlen-Wheeler, Montgomery-Toombs	1	78,100	74,698	3,402	78,100	74,698	3,402	— 1%	+ 2%	(3%)
49	Hall-Forsyth-Dawson-Lumpkin	1	78,400	72,740	5,660	78,400	72,740	5,660	— 1	.....	(1)
30	Carroll-Coweta-Fayette	1	78,700	73,543	5,157	78,700	73,543	5,157	.....	+ 1	(1)
50	Fannin-Union-Towns-White-Rabun, Habersham-Gilmer-Pickens	1	79,100	75,000	4,100	79,100	75,000	4,100	.....	+ 3	(3)
		4	314,300	295,981	18,319						
Districts of 80,000 - 82,000											
8	Lowndes-Lanier-Berrien-Cook-Echols	1	80,600	80,103	497	80,600	80,103	497	+ 2	+10	(8)
53	Dade-Walker-Chattooga	1	81,100	73,884	7,216	81,100	73,884	7,216	+ 3	+ 1	2
		2	161,700	153,987	7,713						
Districts of 82,000 - 84,000											
5	Bryan-Long-Liberty-McIntosh-Glynn	1	82,100	72,905	9,195	82,100	72,905	9,195	+ 4	.....	4
4	Bulloch-Candler-Screven-Evans, Tattnall-Effingham	1	82,700	78,787	3,913	82,700	78,787	3,913	+ 5	+ 8	(3)
12	Dougherty	1	83,400	75,680	7,720	83,400	75,680	7,720	+ 6	+ 3	3
25	Baldwin-Jones-Hancock-Washington, Wilkinson	1	83,700	80,664	3,036	83,700	80,664	3,036	+ 6	+10	(4)
		4	331,900	308,036	23,864						

District Numbers	Counties	Number of Senators	Total Population Estimate 1965	Total Population Actual 1960	Total Population Increase (Decrease)	Average Population Per Senator Estimate 1965	Average Population Per Senator Actual 1960	Average Population Per Senator Increase (Decrease)	Percentage of Population Per Senator Below or Above Average 1965	Percentage of Population Per Senator Below or Above Average 1960	Percentage of Population Per Senator Below or Above Average Increase (Decrease)
Districts of 84,000 - 86,000											
6	Camden-Charlton-Brantley-Pierce, Wayne-Bacon-Appling-Jeff Davis	1	84,700	79,297	5,403	84,700	79,297	5,403	+ 7%	+ 9%	(2%)
54	Catoosa-Murray-Whitfield	1	85,300	73,657	11,643	85,300	73,657	11,643	+ 8	+ 1	7
34, 35, 36, 37, 38, 39, 40	Fulton	7	599,300	556,186	43,114	85,614	79,455	6,159	+ 8	+ 6	2
		9	769,300	709,140	60,160						
Districts of 86,000 or more											
48	Banks-Jackson-Barrow-Gwinnett	1	96,000	83,022	12,978	96,000	83,022	12,978	+22	+14	8
44	Clayton-Henry-Rockdale	1	96,300	74,556	21,744	96,300	74,556	21,744	+22	+ 2	20
41, 42, 43	DeKalb	3	350,400	256,782	93,618	116,800	85,594	31,206	+48	+16	32
		5	542,700	414,360	128,340						
		54	4,263,000	3,942,966	320,034						

APPENDIX C

ELECTION OF GOVERNOR BY LEGISLATURE

The following table compares the candidates' popular vote totals and percentages in the general election for Governor with their totals and percentages if the election were sent to the General Assembly and if each member of the Assembly were to cast his vote for the candidate receiving the most popular votes in his district.

	Popular Vote Recv'd	% of Popular Vote	House	% of House	Senate	% of Senate	Totals in General Assembly	% of Total
Callaway	449,894	47.07%	95	46.34%	25	46.30%	120	46.33%
Maddox	448,044	46.88%	110	53.66%	29	53.70%	139	53.67%
Arnall	57,832	6.05%	0	0	0	0	0	0

NOTES:

(1) Popular vote totals were based on unofficial returns compiled by News Election Service, Associated Press, and United Press International. A breakdown on a district by district basis is not included in the appendices because the pertinent figures on a county by county basis are included in the record and also because of the very limited amount of time available for furnishing this brief to the Court.

(2) Returns were not available for each Senatorial District. Therefore, if a county had more than one Senator, all Senate votes in that county were given to the candidate receiving a majority in the county.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such,
Appellant

v.

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated,
Appellees

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*

v.

LARRY G. JUSTICE, MRS A. P. BRAIL, MRS. VIRGINIA BUDD, DR. YANCEY P. CARTER, JR., NOBLE F. COLLINS, GLEN GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

REPLY BRIEF OF APPELLEES JOHN MORRIS AND FLORENCE ROBIN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, as Secretary of State of the State of Georgia, and his successor in such office, as such, *Appellant*

v.

JOHN MORRIS and FLORENCE ROBIN, for themselves, jointly and severally, and for all others similarly situated, *Appellees*

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY P. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

Reply Brief of Appellees John Morris and Florence Robin

ARGUMENT

In *Finch* v. *Gray,* No. A 96441 Fulton County (Georgia) Superior Court, Oct. 30, 1962, quoted in *Fortson* v. *Dorsey,* 379 U.S. 433, 434-435 (1965), the Georgia court considered the proposed but unratified constitution of Georgia (Georgia Laws, Ex. Sess., May-June, 1964, pp. 234-416 ". . . simply for the light it sheds upon the intention of the General Assembly in enacting the Reapportionment Statute."

The light of that proposed constitution casts a shadow on the runoff remedy provided by Section 34-1514 of the Georgia Election Code.

Article 4, Section 7, paragraph 3 of the Revised Constitution of Georgia (Georgia Laws, Ex. Sess., May-June, 1964, p. 286) dealt with the election of executive officers including Governor. It provided in part:

> "The person having the majority of the whole number of votes shall be declared duly elected to each of said offices. *Whenever no person is elected in the general election to fill any such office,* or whenever any person elected shall die or withdraw prior to taking any such office, *the Secretary of State shall call a special election,* which shall be held not less than sixty nor more than one hundred twenty days from the date of any such event, to fill such position. The incumbent officer shall continue to serve until his successor can be elected and qualified." [Emphasis supplied]

The General Assembly was to "open and publish the returns". A failure of election was contemplated. A special election was to be called.

Regardless of the intention of the General Assembly in acting Section 34-1514 of the Georgia Election Code[1] no runoff election barring write in votes should be allowed by this Court.

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[1] In argument below it was indicated by counsel that the Constitution of Georgia of 1945 and Section 34-1514 of the Georgia Election Code could be construed together. (R. 31) Upon reflection it seems that such a construction would be strained.

Section 34-1514 of the Georgia Election Code may have been forfeited as a remedy since no "court order" barring it was entered in the court below. *Davis* v. *Page,* 217 Ga. 751, 753-754, 125 SE 2d 60 (1962) held that ". . . an election is absolutely void when not held at the proper time and place . . ."

In *O'Connor* v. *Ohio,* — U.S. —, 35 LW 3174 (1966) this Court said:

> "Defendants can no more be charged with anticipating the Griffin decision than can the States. Petitioner had exhausted his appeals in the Ohio courts and was seeking direct review here when Griffin was handed down. Thus, his failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court."

If the ruling of the District Court is affirmed a substantial change in Georgia law will have been effected.

Curtis Publishing Company v. *Butts,* No. 37, October Term, 1966, cert. granted — U.S. —, 35 LW 3124 (1966) involves the application of the rule of *New York Times Company* v. *Sullivan,* 376 U.S. 254 (1964).

Mr. Butts filed suit against the Curtis Publishing Company on March 25, 1963.[2] On August 30, 1962, the *Times* case was decided by the Supreme Court of Alabama. Petition for writ of certiorari was filed on November 21, 1962. Certiorari was granted on January 7, 1963. On August 20, 1963, the jury verdict was rendered.

Attorneys for Curtis Publishing Company had knowledge of the pendency of the *Times* case in this court. They failed to raise the *Times* issue in the trial court. Despite that failure this Court granted certiorari.

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[2] These facts and those that follow were obtained from *Curtis Publishing Company* v. *Butts,* 351 F. 2d 702, 709-710 (1965).

In its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at page 11, Curtis Publishing Company stated:

> "The judicial duty thus defined by these decisions is not qualified by a requirement that supervening change in law must have been anticipated by the litigant who claims its benefits at stages of the litigation prior to the time when it occurred. Such a condition would be patently unthinkable in cases where the change is wrought by legislative action, since no ruling could be premised upon unenacted legislation."

If "supervening change in law" need not be claimed by parties in civil and criminal cases prior to final decision it must not be required of the electorate. If Article V, Section I, paragraph IV of the Constitution of Georgia of 1945 is declared unconstitutional, there has been a supervening change in Georgia's electoral process.

There are 12 commercial television stations in Georgia.[1] There are 170 to 175 radio stations,[2] 31 daily newspapers[3] and, at least, 183 weekly newspapers,[4] in Georgia.

The Atlanta *Journal* is the state's largest daily newspaper. Its daily circulation is 264,836.[5] The Sunday

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[1] Information provided by the Georgia Association of Broadcasters.

[2] Ibid.

[3] 1967 Georgia Newspaper Service Directory, unpublished. Information provided by the Georgia Press Association which has 183 member newspapers. No daily newspapers in Georgia and not more than 6 weekly newspapers in Georgia are not members of the Association.

[4] Ibid.

[5] Newspaper Publisher's Statement for six months ending March 31, 1966. Information provided by Atlanta Newspapers, Inc.

edition is jointly published with the Atlanta *Constitution* to a circulation of 523,238.[6]

Articles, editorials and editorial cartoons in Georgia's newspapers and newscasts commented upon the Republican cross-over vote in the September 28, 1966, runoff primary election and the fact and the effect of legislative selection of the Governor in the event no majority vote was obtained in the General Election. The communications media pressed upon the electorate remembrances of Georgia's County Unit system.

Appendix A hereto, *post,* consists of reproductions of articles from the Atlanta *Journal* during the period from September 28, 1966 to November 8, 1966. Items contained in Appendix B to the Brief of Appellees' *Morris* and *Robin* are not duplicated herein except where they were incompletely reproduced there. The effect of these articles, editorials and editorial cartoons—and similar commentary in Georgia's other daily and weekly newspapers and on radio and television newscasts — was to influence Georgia's electorate in casting their ballots. Cf. *Davis* v. *Schnell,* 81 F. Supp. 872 (S.D. Ala. 1949) aff'd. 336 U.S. 933 (1949).

As noted by Law Week (35 L.W. 1069) "[c]lairvoyance is not often demanded of a lawyer but sometimes it is. See Curtis Publishing Co. v. Butts . . . ." [Citation omitted.]

Whether lawyers are to be required to be clairvoyant or not, the electorate should not be. Thus the

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[6] Ibid.

runoff election remedy proposed by Co-Appellees, *Justice,* et al., would be totally inappropriate here. The misleading of the electorate must lead to a new election.

Respectfully submitted,

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The Atlanta Journal
★ AND ★
THE ATLANTA CONSTITUTION

Jack Spalding, Editor
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Eugene Patterson, Editor
The Atlanta Constitution

. . WHAT HAVE I DONE? . . . HOW CAN I HELP? . . . ??'

31 COCK ROBIN?

Voting Results Gave The Experts Pause

By EUGENE PATTERSON

LESTER MADDOX defeated Ellis Arnall decisively. But nothing decisive has been said about how he did it. Experts still shake their heads in bewilderment when they compare the Democratic races for governor and lieutenant governor.

For governor, Arnall, the moderate, lost to the extremist Maddox by 70,401 votes. Whereas for lieutenant governor the moderate, George T. Smith, won from the extremist Peter Zack Geer by 85,343 votes.

How could this be?

It might be conceded that loser Arnall failed to show an overpowering charisma. But loser Geer was supposed to have that magic attractiveness.

Eugene Patterson is editor of The Atlanta Constitution.

And the good, grey moderate Smith defeated the charismatic Geer, whereas the good, grey moderate Arnall lost to the flamboyant Maddox.

That is what gave the experts pause.

* * *

IF THE VOTERS had wanted moderates, why hadn't they voted for Arnall and Smith?

And if they had wanted extremists, why hadn't they voted for Maddox and Geer?

Instead they had voted for the extremist Maddox on the one hand, and the moderate Smith on the other. Why?

Republican gubernatorial candidate Howard Callaway insisted there was no Republican plot to vote for Maddox so as to set him up as a pushover for Callaway in the November election.

As evidence, Callaway pointed out that moderate Arnall, not extremist Maddox, got the biggest vote in some precincts where moderate Smith got a bigger vote than extremist Geer.

On the whole, however, this was not the rule. Many Callaway supporters obviously did vote for the extremist Maddox, setting him up as Callaway's opponent in November, then turned around and voted for the moderate Smith, destroying the extremist Geer.

Why? Let the voter name his own motive. The evidence suffices to show what happened. He voted for segregationist Maddox and against segregationist Geer.

This was most pronounced in the populous counties. Moderate Smith carried DeKalb by 21,303 votes over segregationist Geer, whereas moderate Arnall carried it by only 6,943 over segregationist Maddox.

Fulton gave Smith a 54,899 vote margin over Geer, while giving Arnall only a 36,713 vote margin over Maddox.

Smith carried Richmond County (Augusta) by 5,012 votes while Arnall carried it by 1,898. Smith carried Bibb County (Macon) by 3,447, while Arnall's margin was only 151.

Obviously moderate ideology was not the controlling factor, or Arnall and Smith would have polled about the same.

Some other factor intruded. Those who think it was a Callaway crossover vote for Maddox are obviously right. Cobb County went for the extremist Maddox for governor, the moderate Smith for lieutenant governor. Clayton County also went for Maddox for governor, Smith for lieutenant governor.

This wouldn't have made sense if it had been isolated. Maddox is extremist, Smith moderate. But it wasn't isolated. Smith carried Arnall's home county of Coweta by more votes (1,205) than Arnall's margin (800). Smith carried his own home county of Grady and Arnall lost it.

* * *

MOST INDICATIVE, however, is the following breakdown. For Arnall backers, it is melancholy. But for students of politics, it is clear. There was a crossover vote—by mad Democrats, Republicans, Callaway types, Maddox sorts, or whatever you want to call them—between the unsuccessful moderate candidate for governor, Arnall, and the successful moderate candidate for lieutenant governor, Smith. As rather conclusive proof, the following counties voted both for the extremist Maddox, and for the moderate Smith:

Lowndes, Sumter, Ware, Tift, Colquitt, Thomas, Bartow, Troup, Houston, Upson, Spalding, Carroll, Bulloch, Bacon, Baker, Brooks, Calhoun, Clay, Crawford, Whitfield, Dawson, Macon, Habersham, Jackson, Jefferson, Jones, Meriwether, Mitchell, Pike, Polk, Rabun, Randolph, Rockdale, Stephens, Taylor, Telfair, White and probably others.

THEY LAUGHED YESTERDAY

Old-Line Demos Lining Up For Maddox Bandwagon

By SAM HOPKINS
Constitution Political Editor

The old-line Democratic hierarchy, confused and disorganized and desperately trying to build up a bandwagon candidate for governor all summer, suddenly has a hard hand on the political reins in Georgia again.

The swift and almost complete swing behind segregationist Lester Maddox since his nomination Wednesday spells serious — maybe fatal — trouble for the political future of Republican gubernatorial candidate Howard (Bo) Callaway.

Maddox not only now has the political machine of Sen. Herman Talmadge and the statehouse "clique" behind him, but also the endorsement of Gov. Sanders and most other high elected officials.

It is something of a phenomenon that so much political power is backing such a man as Maddox, who had been a loner during most of the campaign.

NOT A SINGLE high Democratic leader was actively backing Maddox during the summer. In fact, he was still considered something of a joke even up to the day of the runoff.

Most observers had thought all along that if by some stretch of the imagination Maddox should win the Democratic nomination for governor, he would be too much for the old power structure to stomach and that they would then privately go to work for Callaway.

But Maddox's victory over former Gov. Ellis Arnall was such an overwhelming one, it appeared that he had created a bandwagon of his own.

It seems apparent that Talmadge and the others suddenly adjusted their glasses and took another quick hard look at this massive vote-getter, and being the political animals they are, decided that regardless of the "ax handle image" Maddox has developed, he could beat Callaway and thus keep the State Capitol under Democratic control.

NEWS ANALYSIS

SO THE BANDWAGON that Maddox started singlehandedly is now bulging with people who a month ago were laughing at him.

If Maddox should defeat Callaway and become governor, he will be surrounded and influenced by the old-line politicians who are just as much segregationists as he.

This group lost control of the state when Carl Sanders was elected to office. Sanders did not quite fit into the old political mold and was more moderate on most matters than those who generally were connected with the Talmadge machine.

It is one of the ironies of politics that it took Lester Maddox to bring enough unity to the Democratic party to finally give it a chance of beating Callaway.

IF HE WINS, it will also be because many of the "mad Democrats" who were going to vote for Callaway decide to switch to Maddox.

The nomination of Maddox actually has resulted in a bigger number of "mad Democrats" in Georgia. The first group included those protesting the Great Society and President Lyndon B. Johnson — apparently based mostly on the race issue—and the new "mad Democrats" are those incensed over Maddox's victory.

It is much too early to say Maddox will definitely win the Nov. 8 election. Callaway, after all, has been considered to be the frontrunner for some time. He still is a formidable candidate.

It may depend on how much political switching and counter-switching-around happens in the next 38 days as to who wins.

Anyone for a write-in?

ATLANTA JOURNAL - CONSTITUTION
SUNDAY, OCTOBER 2, 1966

YES, VOTERS, YOU CAN ADD EXTRA NAMES TO BALLOT

A write-in vote for some Georgian other than Lester Maddox or Howard (Bo) Callaway for governor will be possible in the Nov. 8 general election.

Some Fulton voters have complained they're being told a write-in vote isn't possible.

Secretary of State Ben Fortson Jr., chairman of the State Election Board, said Saturday "there is no uncertainty" about the state election code requiring space on a ballot for write-in votes in the general election.

Write-in votes were not possible in the primary, however.

Two different sections of the election code spell out state law on the subject.

Mr. Fortson said voting machines, votomatic machines and paper ballots must provide a space for write-in candidates.

He said managers and poll workers are obligated to show voters the write-in columns where they can manually write in their choice for a particular office if they don't want to vote for any of the candidates on the ballot.

"This is very clear under the law of Georgia," he said.

A majority rule also will prevail in the general election just as it did in the primary. If a write-in campaign kept one candidate from getting a majority of the votes, a runoff would be held Nov. 22 between the two highest vote-getters.

ATLANTA JOURNAL Oct. 3, 1966

'I THINK TH' BUTLER DONE IT!'

OCT. 3, 1966

The Atlanta Journal

"COVERS DIXIE LIKE THE DEW"

Carter Disavows Write-In Effort

Need for Money Cited; Nominee Pledged Support

By WILLIAM O. SMITH

The effort by some Democrats to launch a planned state- write-in campaign for State Sen. Jimmy Carter as rnor in the general election was apparently floundering out scuccess Monday.

n. Carter, who finished third e Democratic primary, said elephone from Plains that absolutely wants no part of rite-in campaign on his be-

denied reports that he has privately he would not op- e a write-in campaign ough he isn't trying to get started.

I have never said that," he told The Journal. "I have discouraged everyone, privately and publicly, from starting a write-in campaign for me."

And a Carter supporter in Atlanta who was trying to muster write-in support for the senator late last week told the same story Monday. He said that apparently nothing will come of the effort.

The Atlantan said such an effort would take "a lot of money and support from the nominee himself." Neither seems forthcoming, he said.

SEN. CARTER mentioned the money angle as one of three reasons why he won't accept a write-in draft. He estimated it would cost several hundred thousand dollars to conduct such a campaign—money he doesn't have available, he said.

Several checks have been sent to him but he has returned all of them, he said.

But even more important, Sen. Carter said, is his belief he has responsibility to support the Democratic nominee, Lester Maddox, because of the pledged he signed to support the party's winner when he became a candidate.

"I would not do anything openly or behind the scenes to break my pledge to support the Democratic nominee," he said.

Although he hasn't talked to Mr. Maddox about helping him against Republican gubernatorial candidate Howard (Bo) Callaway, he said he has pledged to help all Democratic candidates for governor, Congress, and General Assembly.

Sen. Carter said there is "inherent strength" in being the nominee of a political party and he thinks it would "be a mistake" for Democrats to get behind anyone other than Mr. Maddox.

If he got into a write-in campaign, he said the most likely result would be a runoff. If he got into a runoff with Mr. Maddov, he said he believed Callaway supporters would vote for Mr. Maddox and vice versa.

EVEN THOUGH Sen. Carter seemingly has removed himself from an active write-in campaign, there are still indications he will get some votes. The Journal received some calls indicating this Monday morning.

One of the fears held by dissident Georgians is that these unsolicited votes for Sen. Carter will work against Mr. Callaway and assure Mr. Maddox' election.

A full-scale write-in campaign by Sen. Carter would probably force a runoff, they say.

Sen. Carter also predicted that Mr. Maddox will defeat Mr. Callaway. He said there is "overwhelming support" for Mr. Maddox now—even from people who said before the primary they would vote for Mr. Callaway.

There is no doubt that area around Sumter County will go for Mr. Maddox, he said.

At a recent barbecue, he said 22 of 34 farmers indicated they would vote for Mr. Maddox. If Ellis Arnall had been the Democratic nominee, all of those votes would have gone to Mr. Callaway, he said.

ATL. JOURNAL

The Write-In

OCT. 4, 1966

THE COLLAPSE and deflation of that doubtful organization known as the Democratic Party of Georgia and its conversion into the Maddox Party is having some interesting side effects.

One is the move for write-in candidates.

Behind this move are those who find it impossible to vote for the nominees of the Maddox Party and particularly Lester Maddox himself, and who do not find the Republican nominees and particularly Rep. Howard (Bo) Callaway attractive either.

The write-in is legitimate.

It gives people with no place to go some sort of outlet and therefore is therapeutic.

But is it effective?

The chance of a candidate's being elected by such action and in the face of the Maddox and Republican organizations is practically non-existent. We can't at this point see the General Assembly acting as it once did during an interregnum to give Herman Talmadge the governorship on the basis of some Telfair County write-ins.

But a write-in shows idealism, and a refusal to compromise with principle.

Rep. Charles Weltner has given us a stirring example of this sort of idealism.

As long as we have this sort of idealism and enough of these idealists around, then democracy survives in Georgia, although it may have to go into exile occasionally.

ATL. JOURNAL OCT. 4, 1966

Charter Prohibits Write-In Runoff

A strong write-in vote in the Nov. 8 general election was still a possibility Tuesday but there were indications it could cause quite a snafu.

Secretary of State Ben Fortson Jr. reported that the State Constitution prohibits a runoff for governor if one candidate does not get a majority of the votes.

IF THIS should occur, the responsibility of electing a new governor would be thrust upon the General Assembly, who would make the selection from the top two vote-getters, he said.

Gov. Sanders would continue serving until a new governor is selected.

One major problem arising from such a happening might be in the realm of budget preparation. State law says the governor must present a proposed budget to the General Assembly within five days after it convenes.

PAST GOVERNORS have had about three months to work up a budget proposal because Democratic nominees never had any opposition. This year there is only about one month between the Nov. 8 general election and the date the budget must go to the printer — about Dec. 10. Budget officials say this isn't much time.

If a governor's election was not definite when the General Assembly met, there would be problems meeting the state law requirement for submitting a budget proposal within five days of convening.

Meanwhile, several groups were active in trying to work up write-in campaigns.

A FORMER supporter of Democratic candidate Ellis Arnall, who lost to Letser Maddox in a runoff, said a write-in campaign for Mr. Arnall is under way that has "gone beyond the conversation stage." He said it is being pushed by business leaders who want a candidate to the left of Mr. Maddox. Mr. Arnall has had a chance to stop it without doing so, the spokesman said.

A meeting is scheduled Tuesday night at 8 p.m. in Plaza A of the Georgian Terrace Hotel at which time Georgians interested in a write-in campaign will discuss how to go about it.

A SPOKESMAN said this was a "purely exploratory" meeting and no particular candidate has been mentioned for a write-in vote.

Another group was to meet Tuesday afternoon at the Mark Building, 98 Alabama St. SW, to discuss an "oust Lester Maddox" campaign.

A group of Georgia State students organized Monday to push a write-in campaign for State Sen. Jimmy Carter.

Sen. Carter said emphatically Monday he is not interested in becoming a write-in candidate—and reiterated it Tuesday.

ATL. JOURNAL OCT. 5, 1966

Convention Ouster Aimed at Maddox

Moderate Democrats Seek New Leadership

By CHARLES POU
Atlanta Journal Political Editor

Georgia's many-splintered political scene continued to amaze and confuse Wednesday, and among the new developments were these:

—A group of moderate Democrats began the beginnings of a "new" Democratic party—with the ultimate purpose the challenging of any Lester Maddox-led delegation to the 1968 National Democratic Convention. At least one elected state-house official was said to be among the planners, and an off-hand guess was that such an outfit would stand a good chance of being seated at the 1968 affair.

—A "Democrats for Callaway" organization was in the making—entirely separate from the Democrat group cited above—and some right big names were being mentioned as steering committee for it.

Among some of these were Atlanta banker William R. Bowdoin, former Mayor Steve Knight of Columbus, a past president of the Georgia Municipal Association, Mayor George Sancken of Augusta, former Rep. Frank Tift of Tifton (already an announced supporter of Callaway); Wyck Knox of Thomson, a former state senator, and others.

—A group of disgruntled Democrats met Tuesday night until an early hour to try to find a "write-in" candidate to oppose both Callaway and Maddox. They finally decided on Ellis Arnall — but reliable sources close to Mr. Arnall predicted he will flatly oppose the move.

HOWEVER, these sources, who since have been demoted to the category of "sometimes reliable sources," apparently did their guessing without consulting Mr. Arnall. When reached for comment, he said he would neither encourage nor discourage the move. He said:

"I will neither be a party to encouraging a write-in campaign nor will I be a party to preventing one. It is a completely free decision for every Georgia voter to make.

"It is a matter which directs itself to the conscience, obligations of citizenship and the political judgment of each person, in the light of his or her understanding and the long range best interest of our beloved state."

He began his comment by reminding the caller of his own pledge as a candidate to support the eventual nominee. The former governor concluded:

"If the people of Georgia want to move forward with a write-in campaign that's their business—but I cannot personally get in it, nor do I intend to do so."

IT IS KNOWN that a group looking toward the 1968 National convention has already held one meeting to plot a course. Among the charter planners, it was reported reliably, were some elected Democratic officials.

"We have two or three things in mind," said one of these latter.

"First, we want to get started early—so there will be no question that this is just a trumped-up thing, the charge which was made successfully against the so-called Freedom Party of Mississippi. They got organized just before the 1964 Atlantic City convention and did not really give the national party leaders much legal grounds to seat them.

"Secondly, we think they will seat us—Maddox was for Barry Goldwater in 1964 and so was his new party chairman, James Gray of Albany. We are sure the national party will be sympathetic toward us.

"WHETHER MADDOX wins or loses in his race for governor, he will be so-called titular head of the Georgia Democratic party. Our very presence as a threat will tend to help keep him more in line."

But he said he believes the real purposes of "Maddox, Roy Harris, Calvin Craig and all of them" is to get behind George Wallace for " a third party move" in 1968.

HE ADDED:

"I doubt they'll care much whether they get kicked out of the 1968 convention or not. But we are sure going to try to help see to it they do get kicked out."

The Atlanta Journal

"Covers Dixie Like the Dew"

Since 1883

Jack Tarver, President • Jack Spalding, Editor

The Old Clans Rally

THE DEMOCRATIC Party of Georgia long has been whoever was governor at the time.

It was a family affair. It belonged to a loose coalition of friends and relatives, and its members ran it to suit themselves.

There were no outside pressures, Georgia having been a one party state for nearly a century. Occasionally there was an internal feud over the matter of succession to the governor's chair.

But these feuds were settled easily as the county unit system allowed control of the state by the chosen few, and the votes of the common people in the primaries were of little concern to the chieftains of the leading Democratic clans of Georgia.

Times changed, and even the county unit system came to an end.

A two party system reared its frightening head.

Today we see an interesting funny thing. We see the chieftains of the old Democratic clans (with a few proud exceptions) rallying to the defense of their one remaining asset—the State Capitol and the pap and patronage that goes with it.

The old clans have a new leader, Lester Maddox, who obliterated Ellis Arnall in the recent Democratic primary. How homage to this new leader must hurt the pride of some of the old leaders of this group.

But business before honor, and if Mr. Maddox loses in the general election, a lot of our sinecure specialists are going to have to find a way to support themselves or starve.

Mr. Maddox's opponent is Rep. Bo Callaway of Pine Mountain, a Republican. One of the chief criticisms of Mr. Callaway has been the support given him in the past by some of the discredited old county unit Democrats.

They've all gone back where they came from now, and as Mr. Callaway puts it, he's got nobody left but the people. Without the county unit system that is all it takes.

parently is of no consideration to many in Africa and elsewhere who want an end to the minority white control, even by force of arms.

They furiously want to make the change although it could produce chaos not only in South Africa but in Botswana and Lesotho, and make all three candidates for international handouts.

The Terror Spreads

THE TERROR is definitely spreading. You know that is so when you read that Martin Luther King Sr. thinks Herman Talmadge should be drafted for governor.

The Rev. Mr. King expressed his sentiments when a sizable and diverse group gathered Tuesday night in Atlanta to organize for a write-in vote against Lester Maddox and Bo Callaway.

"We've got to get the best vote-getter we can get," he said. "You folks who have entree had better go get Herman Talmadge. . . ."

So much for the headlines. ("MLK Sr. All-Out for Herman.") Now for the news.

The write-in meeting seemed to be somewhat divided. But by a close margin, George T. Smith nosed out Ellis Arnall to win the most votes in a straw poll. The poll was taken to advise the new write-in organization's steering committee, which presumably will decide what to do next.

At the height of The Terror, one man present extolled the virtues of Bo Callaway, as best he could, considering that he doesn't like Bo Callaway. "I can't conceive of Bo Callaway waving an ax handle or pistol," he said.

True. We hadn't thought of *that*.

It was certainly a different kind of "The Man Who" speech. ("And now I give you the man who could never wave an ax handle. . . .")

Perhaps it contributed somewhat to easing of The Terror to mention that only one of the candidates is an ax handle man.

It probably added a little to The Terror, however, when one man present mentioned that a good write-in campaign might cost, say, $250,000.

Those present at the meeting did not adopt a slogan for the new write-in organization. A student picketing the Bo Callaway campaign opener had a sign saying "Go Bo, the Lester of the Two Evils," but the write-in group definitely was not interested in that course of action or that slogan.

We do not know what course events now may take with the write-in movement. It is certainly well-motivated, for these were mostly amateurs concerned about our state. But at the moment The Terror seems to be running too strong for a clear picture to emerge. Meanwhile, we'll ponder "MLK Sr. All-Out for Herman."

CALLAWAY AND MADDOX

ATL. JOURNAL Oct 6, 1966

A New Phase, and Maybe New Strategies

By JACK SPALDING

RIGHT NOW we are in the eye of the hurricane. Enjoy the calm while it lasts. Our politicians are regrouping and retooling the candidates and getting ready to blow us down again.

A lot lies behind, including a bunch of flattened Georgia Democrats and the corpse of the old Georgia Democratic party.

What lies ahead? Maybe the computers can tell and maybe the poll takers. They have taken over the art of politics in much of the country, but here we still have them baffled. A self-respecting human isn't going to tell a poll-taker how he's going to vote, particularly if he's half way ashamed of what he's planning to do. Judging by the way things look, the human equation is mighty hard to feed into a computer too, particularly if the equation is Georgian. They don't make computers yet which understand us.

* * *

A LOT lies behind but there is a lot more to come. Rest while you can and brace yourself for the next blow.

The wind ought to start rising about October 15 when that body officially known as the Georgia Democratic party holds its convention in Macon. It will be the unveiling of the party's new leader, Lester Maddox. On that day we will see the launching of the new Maddox Party of Georgia, and where it will go, nobody knows.

Will Mr. Maddox be re-tooled to meet the Republican threat to the State Capitol and all the pap and patronage that goes with it? Will he be given a new gloss, in order to aid our old Democratic officeholders in hanging on to their state sinecures forevermore? Will he be a little more worldly in his approach to things to help our statesmen in Washington maintain their position before the nation?

Ah. This is what is worrying the politicians now. Their way of life is at stake and Mr. Maddox either saves it for them or they go down the drain together.

On the other side? We have Rep. Bo Callaway of Pine Mountain, a Republican. Mr. Callaway is a man of unquestioned integrity and considerable promise. That so many of our old Democratic politicians deserted him in favor of Mr. Maddox after the smashing Maddox runoff victory is the highest possible recommendation for Mr. Callaway.

A man is judged by the company he keeps. Mr. Callaway said only last Tuesday that he had no political backing any more. All he had was the people.

Well, that is all Mr. Callaway needs, but first he has got to get those people stirred up about him.

So far he's been looking like a politician in need of some guidelines, uncertain of where he ought to go and what he ought to do. The new Maddox Party has pre-empted the far right, and taken a lot of old Callaway far rightists along. It doesn't look like they're going to come back and go with Bo.

But the world isn't full of racists and far rightists, no matter how you read the results of the Democratic runoff.

A lot of people will take honesty over all else, and if the Callaway people want to sharpen the image of their candidate, he radiates that quality.

A lot of people prefer good government over racism, and with some of the friends Mr. Maddox now has, Mr. Callaway has a clear field here.

This is a year of revolution and could be the end of the Georgia Democratic party (as we have known it).

But do the Callaway advisers grasp this fact? They've shown no signs of it. So far they're running Barry Goldwater against Lyndon Johnson again, and nobody is going to come to town on a rainy day to watch this old rerun.

* * *

JUST AS a group called Democrats for Goldwater carried Georgia for the Republicans in 1964, help for Callaway can come from a Democrats for Callaway coalition. Republicans are nice people, but they're just not political.

There are a lot of skillful Democrats in Georgia (with hearts and heads instead of slide rules) and their old party has gone where they can't follow. Callaway Republicans can provide money and machinery. But it is going to take Callaway Democrats to provide spark and the proper political instincts.

PAGE ONE

Write-in Plan Under Attack

ATL. JOURNAL
OCT. 7, 1966

Sen. Hill Says House Might Decide Election

By CHARLES POU
Atlanta Journal Political Editor

A state senator and an Atlanta alderman Friday spoke out sharply against the write-in campaign under way among some Democrats. Both pointed out indirectly that such efforts very likely would give Atlanta segregationist Lester Maddox two shots at becoming governor.

State Sen. Render Hill of Greenville said it almost directly.

"If you are for Lester Maddox," said the Democrat, "vote for him. If you're not, vote for Callaway. What a lot of people don't understand, I believe, is that it is the Georgia House of Representatives — not citizens —who would choose between Maddox and Callaway, in the very likely event that neither had a clear majority as a result of the write-in campaign."

He added: "Here's an illustration: Say Callaway got 49 per cent of the vote, Maddox 31 per cent—the write-in candidate 19 per cent. That would throw the election to the Georgia House of Representatives."

THAT LEGISLATIVE body, rural-dominated and still containing only a smattering of Republicans, would undoubtedly elect Maddox, in the opinion of most observers.

The last time members of the Georgia House had a chance to elect a governor, they chose Herman Talmadge on the basis

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WRITE-IN ATTACKED

of some "write-in" votes he was supposed to have gotten in his native Telfair County. Some of these, it was disclosed later, were of a transparent nature.

This occurred when Mr. Talmadge's father, the late Eugene Talmadge, died, after winning the Democratic nomination. The Georgia Supreme Court overruled the action of the House members and named M. E. Thompson acting governor.

Alderman G. Everett Millican, who also is a former state senator, said he thought "it would be a great mistake for us to have a write-in-campaign." He added:

"In the first place, it couldn't be successful. The next thing is: the people have two candidates to vote for for governor—one Democratic, one Republican.

"If they don't want one of these, they've got the choice of the other, and they ought to take it. Beeause, generally speaking, if you write-in in order to beat one candidate, what you really do is give that candidate a better chance to be elected."

Mr. Millican said also that there was a possibility a write-in campaign could force the decision into the House of Representatives.

"I don't think the possibility is great," he said, "but if that happened, it would be a mistake. I think it would be wrong for anybody but the people to select our governor."

COMMENTS FROM the two men got a rebuttal, however, from James O'Hear Sanders, a sponsor for a write-in movement in behalf of former Gov. Ellis Arnall.

"Anyone who thinks of the write-in campaign for Gov. Ellis Arnall has no chance of victory has badly misread the determination of hundreds of thousands of aroused Georgians who cannot accept either Lester Maddox or Howard "Bo" Callaway," he said.

"Following a brief announcement of the start of the write-in campaign," said Mr. Sanders, "more than 50 persons attended a spontaneous rally at the Georgian Terrace Hotel. These 500 delivered a mandate to their elected steering committee—that mandate being to forge ahead with a campaign to elect Ellis Arnall.

"Since that rally, committees have been established, fund-raising has begun, and we have seen the marshaling of support for the write-in campaign by other groups—the Fulton County Democratic Executive Committee, the Young Democrats Club, and Young Democrats organizations at Morehouse College, Emory University and Georgia State College."

"AT 3 P.M., Sunday," added Mr. Sanders, "there will be a state-wide rally of Arnall supporters in the ballroom of the Atlanta Biltmore Hotel, and a college students' parade, with participants from all over Georgia, is scheduled in Atlanta on Wednesday."

Meanwhile, the Fulton Atlanta County Democratic party urged its members Thursday night to write in a candidate for governor in the Nov. 8 general election as a slap at the party's nominee, segregationist Lester Maddox.

A statement issued by the party's executive committee said Maddox did not stand for the platform and "therefore the party cannot accept Mr. Maddox."

The party left the choice of write-in candidate to the voters.

The action brought quick response from Maddox, who has lost the support of several Democratic factions since defeating Ellis Arnall in the primary runoff.

"I have never seen such bitterness before when I have lost," he said. "I think it's time all Democrats, whether spelled with a big D, little D or middle-sized D closed ranks now that they have a mandate from the people."

Jack Turner, head of the Fulton County group, said the statement meant Fulton County Democrats could not support either Maddox or Republican Howard (Bo) Callaway.

The Young Democrats Club executive committee passed a resolution to endorse a write-in campaign for former Gov. Ellis Arnall, beaten in the runoff by Maddox.

In addition Young Democrats at Morehouse College, Emory and Georgia State endorsed write-in campaigns for Arnall. The Georgia State group switched from Jimmy Carter.

These new groups join ranks with another group of about 400 who met Wednesday night in Atlanta and chose to back Arnall as a write-in in November. Arnall is the only defeated primary candidate to announce he would not oppose a write-in campaign.

A few persons at the Fulton Democratic meeting of about 200 protested a write-in because they felt it might help the election of Callaway.

ATL. JOURNAL OCT. 7, 1966.

Republican Fumbling

DISSATISFACTION with the nomination of Lester Maddox as the Democratic candidate for the governorship is spreading.

Several groups are suggesting write-in candidates in place of Mr. Maddox.

Write-ins are fun. But they generally are futile.

Still, if a voter wants to write in the name of Ellis Arnall, Jimmy Carter, or Willie B. III out at the zoo it is his democratic privilege.

Still, something is wrong.

We are supposed to have a two-party system in Georgia this year, and a choice of two candidates. If the voters don't like one, they vote for the other.

If the voters don't like the Democratic Mr. Maddox, they should vote for the Republican Mr. Callaway.

But many can't see a choice. These candidates look a lot alike to a lot of people.

Here is the basis for a Republican failure that could be disastrous. This party still is running Barry Goldwater against Lyndon Johnson, and nobody against Lester Maddox.

Georgia has a lot of Democrats who can't go with Lyndon Johnson in one direction or with Lester Maddox in the other.

They should be able to go with Bo Callaway and the Republicans.

But so far the Callaway strategy has been to overlook this big moderate bloc which could give him victory.

What's the matter, Republicans? Waiting for new guidelines from those computers?

Republicans are nice people, but they're not political.

If they don't grasp this opportunity, they deserve to die.

ATL. JOURNAL OCT. 8, 1966 PAGE ONE

Write-in Helps Foe, Callaway Declares

Rep. Howard (Bo) Callaway, the Republican candidate for governor, says any write-in campaign by dissatisfied Democrats will only help his opponent, Democratic nominee Lester Maddox.

Speaking before some 1,000 persons at a Macon rally Friday, Rep. Callaway said the most a write-in campaign could accomplish would be to throw the election into the Georgia General Assembly where Democrats are already assured of a big majority.

The legislators "in all probability would support Lester Maddox," the GOP standard bearer pointed out. He urged the write-in groups to abandon their efforts and join him.

TWO GROUPS are at work at present. The one with the biggest ads and biggest turnouts so far backs Ellis Arnall who ran second to Mr. Maddox in the Democratic Primary runoff. The other faction is pulling for State Sen. Jimmy Carter.

A rally and parade are being planned by the Arnall write-in group in Atlanta.

"Now the people of Georgia do have a choice, said James Sanders, who helped open a headquarters for the "Write-in, Georgia" organization.

But Rep. Callaway said there is no chance for a write-in to outpoll either himself or Mr. Maddox.

"There are a number of sincere and dedicated people involved in this; people trying to do what they feel is right for the state," the GOP nominee commented. "I would not like to see these people get involved in a situation that would end up helping my opponent."

Although he was skeptical about letting State House and Senate Democrats decide the governor's fate, Rep. Callaway was enthusiastic about them deciding some legislative matters for themselves.

He lauded members of both houses who have organized moves to obtain greater independence from the governor.

A Senate group has been pushing revision of rules to allow a standing committee on committees make assignments, rather than the lieutenant governor. A House movement is under way to elect the speaker by secret ballot to lessen the governor's influence in filling the post.

ATL. JOURNAL. SUNDAY, OCT. 9

Georgia Politics

by CHARLES POU

Weltner Thrust Into Limelight; Maddox Viewed as Leading

Social, Political and Notes From All Over; Besides That, Life Is Composed So Much of Odds and Ends. . . .

Now comes the guessing on who's ahead, Lester Maddox or Bo Callaway? I am really not trying to jinx the fellow (not yet, any how) but a guess here is that as of today the man out front is Maddox. . . .

The following report is highly unconfirmed, but it had been going around in Washington some before Rep. Charles Weltner made his momentous decision not to seek re-election (because of Democratic party nominee Maddox) and it was that: The young Atlanta congressman is considered running-mate timber by Bobby Kennedy, and Kennedy thought so before Weltner had his great wrestling match with conscience.

A word or two of explanation and hedging is needed, even for such far-off and safe speculation as this (man, like it is at least two years and very likely six before folks find out if it is true or not): Presidential nominees seldom choose their running mates, for sure, that is, until they nail down the No. 1 spot — then come all sorts of factors: region, religion, remorse and, as a matter of factor, there might even be a cotton factor. Anyway, the way we heard it, Kennedy threw out the name of Weltner in a private conversation, among others, as a possible name to be considered when and if it becomes the turn of Bobby Kennedy, and if region is a consideration. It was noted that Vice President Hubert Humphrey, also looking to 1972, plugged Weltner mightily after his announcement that he would not crash the Maddox party. . . .

THEY DO HIM WRONG who portray Sen. Richard B. Russell as helping in the campaign of Mr. Maddox. The senior Georgia senator rates in every poll as the state's most popular politician — and one reason he fares so well is a lifelong reputation of messing with no one's politics but his own. The thing about Russell always going to Spain during presidential campaigns, and efforts to make word play on that and the little song from "My Fair Lady," has been far, far overdone in some quarters. Thus it takes real restraint here not to try something like this (assuming Russell is as popular as polls say he is, and has the potential of state party leader they would indicate): During a political campaign, Sen. Russell always hies himself off to Spain, where he lets his party reigns fall gently on the plain.

See? There's absolutely nothing further can be done with it.

But the following story is true. It cannot be recalled whether it has been reported here before.

When President Johnson made his plane-swing through Georgia in 1964 — the fall one, when he was campaigning against Goldwater — he turned to one of the Georgia notables who boarded the plane in Macon and said:

"Where's Dick? Spain? Hell, Franco oughta make him ambassador plenipotentiary . . ."

ANYHOW, that's what LBJ said, and although we usually do not pass along polls from schools, colleges and the like (because one never knows who was rigged, who was the riggee) we will report on one from the Emory University Law School as believed to be honest and with some news value: Both Callaway and Maddox appeared before the students during the past week. A straw vote, participated in by 92 per cent of the students, broke down as follows:

Callaway: 61 per cent.

Maddox: 10 per cent.

Write-ins: 29 per cent.

Some will think the high write-in percentage is the most interesting result of the survey of this particular group, because it would appear to be fairly high. We have a notion, though, not even this group fully understands the likelihoods of the result of write-in. But putting forth notions like that, it strikes here, is bordering on editorializing, in fact dimly creeping up on the shore of it, and we'll just give the breakdown on the write-ins.

There were 68 of these, and Ellis Arnall got 50 of them. Former Sen. Jimmy Carter got 6, House Speaker George T. Smith 2, Mayor Ivan Allen 1, and the rest were scattered among several folks, some of apparent screwball nature.

But one of these wasn't. Sen. Ben Johnson of DeKalb got one vote.

And if the students signed their ballots, we predict a bright future for the kid who voted for Johnson.

The DeKalb legislator also is dean of the law school. . . .

Atl. Journal and Constitution, Oct 9, 1966

WHERE DO THEY GO?

Callaway Utterances Frightens Moderates

By EUGENE PATTERSON

THE CALLAWAY CAMP was taking a crash poll during the past week to see what was going on in the voter's mind. The delay was costing the Republican candidate time. Ten days into the general election campaign for governor, Lester Maddox as well as Howard Callaway seemed to be curiously glued in place.

Some of Maddox's momentum seemed to be spending itself in uncertainty after he startled the nation by running away

Eugene Patterson is editor of The Atlanta Constitution.

with the Democratic nomination. He had no organization, no money, and no experience at winning, so some milling around was to be expected as he tried to learn the ropes.

* * *

MORE SURPRISING was the slow start of the Callaway crowd. Their candidate had money, organization, glamor and high expectations. But he apparently didn't have a contingency plan ready to cover the eventuality of a Maddox victory. He marked time and took a poll.

No poll was really necessary to discern the main outline of the matter.

Maddox had taken away most of the hard-line segregationist vote which Callaway had counted on, together with a loyalist, party-line Democratic vote of indeterminate size.

Callaway, having thus lost the "mad Democrats" on which Goldwaterism was built, was reduced to his impotent minority of white-collar Republicans and whatever number of anti-Maddox Democrats he could attract.

Suddenly, therefore, the moderate Democratic vote became the swing vote in Georgia.

And in the first 10 days neither candidate acted as if he knew it.

Callaway opened his campaign against Maddox by taking a swipe at Gov. Sanders, of all people. Sanders is a leader of the moderates Callaway needs.

Then when Democrat Charles Weltner withdrew from Congress in protest against Maddox's nomination, Callaway did not exploit the opening by joining the Democratic attack on Maddox; instead he slighted Weltner, and for the second time rawhided the moderates whose vote he needs.

* * *

ON HIS RECORD of ax-handle extremism, Maddox cannot hope to win any of the moderate Democratic vote except that part which can put party loyalty above all.

But Callaway can lose the moderates, too. They do not have to turn to him if he makes no turn toward them. They can stay home or stage a protest write-in, which would have the effect of helping Maddox beat him. The extreme discontent among moderates, and the direction it will take, may decide this election.

For all the national head-shaking about Georgia, the state is probably still moderate in its majority, not extremist. The two moderate candidates for governor, Ellis Arnall and Jimmy Carter, polled more votes in the Sept. 14 primary than all four of their segregationist opponents combined.

Moderate Arnall should have beaten the segregationist Maddox in the Sept. 28 runoff if the "Callaway crossover" voters hadn't outsmarted themselves by voting for Maddox—thereby handing their man Callaway a bear by the tail.

* * *

IT IS HARD to credit Callaway's claim that the crossover didn't beat Arnall. He says Arnall carried Republican strongholds, and that's right; but look at the margins. The moderate Arnall carried the Republican stronghold of DeKalb by only 7,000 votes while the moderate George T. Smith carried it by 21,000 for lieutenant governor. (Last Sunday's column corrected, incidentally, on one listing: Whitfield County went for Arnall, not Maddox.)

The moderate Smith's smashing victory statewide over the racially extreme Peter Zack Geer stands as proof that the moderate vote, when spared any tampering or stunting, remains the majority vote in Georgia. If Callaway's polls convince him of that, he may still have some time left to appeal to the moderates to rescue him from the mad Democrats who loved him before Lester showed up.

Page Tightly Bound

Write-In Issue Splits Camps Of Candidates

By CHARLES POU
Atlanta Journal Political Editor

Georgia's two conservative candidates for governor Saturday continued to pursue votes in vastly different fashion, and the side controversy on the "write-in" issue — whether such effort is good, bad or indifferent — moved along with equally vastly different interpretation.

James O'Hear Sanders, a well-known figure in the fight to abolish the county unit system in Georgia, announced plans for a write-in rally in Atlanta Sunday in behalf of former Gov. Ellis Arnall. The event is scheduled at 3 p.m. at the Biltmore Hotel.

Rep. Howard (Bo) Callaway Friday joined some state Democratic leaders as saying any write-in campaign could help only opponent Lester Maddox. There has been some speculation that some Maddox advisers might be in the background during some of the pull-stringing in the write-in effort.

However, Roy V. Harris of Augusta, a veteran Georgia political craftsman and announced supporter of Mr. Maddox, was not immediately available for comment.

"Incredible nonsense," Mr. Sanders said about such rumors, put forth by Mr. Callaway and others. "Mr. Callaway is thrashing aimlessly about in search of hope, and there is little hope for him."

He said the write-in campaign was becoming a "statewide, grassroots" affair. He added:

"It's no secret. There is a giant faction behind this campaign—the biggest of all: The aroused people of Georgia who can neither swallow Lester Maddox nor digest seesaw Howard Callaway.

"THIS FACTION — these Georgians—who cannot sacrifice the state to plain-spoken racism or its sophisticated version are going to vote their consciences and their self-respect. They are going to write in ballots for Gov. Ellis Arnall."

Meanwhile, former Rep. John Greer, who served as campaign coordinator for Mr. Arnall, stayed out of the mainstream of the write-in debate. But he did express concern writing-ins might hurt the cause of Fulton County Democratic candidates. He said:

"The people of Georgia have three chances to vote for a governor: The Democratic candidate, the Republican candidate, or write-in vote for any citizen of the state.

"As a lifelong Democrat who believes that the two-party system is the very backbone of stable government in our nation I cannot bolt the party, no matter how attractive the idea may seem to be.

"As one of the managers of the campaign of Ellis Arnall, I, of course, think he was the most able candidate. We ran a hard race and did the best we could. In Fulton, we have many fine candidates for the Senate and the House of Representatives and a very fine candidate for Congress, Archie Lindsey. I hope that every Democrat in Fulton County will support these candidates and work for their election."

He added that the "two-party system works best for responsible government" and declared that "too much splintering would place us in the position of France . . floundering until in effect they moved into a system of dictatorship. . . ."

The Atlanta Journal

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'YOU LEAD TH' CHEERS, LESTER; I'LL CALL TH' PLAYS!'

Page Tightly Bound

ATL. JOURNAL

Second FRONT

Wednesday, Oct. 12, 1966

PAUL

HEMPHILL

Arnall's Army

Out on the street below, Forsyth Street, there was an orange delivery truck from an office supply firm and the workers were unloading second-hand desks onto the sidewalk. That was a good thing, because if there was one commodity they needed on the fourth floor, in the offices of "Write-In Georgia," it was desks. And chairs and telephones and maybe a sofa, but a desk was a good place to start. Your voice echoed when you spoke, like in a warehouse. The floors were dirty. They were having to run a statewide campaign with two telephones. But at 10:30 Tuesday morning the one thing they had going for them was boundless hope, and one of them sat behind one of the few desks and looked over a pile of letters with dollar bills in them and he looked tired.

PAUL HEMPHILL

"Somebody called it a grass roots campaign," he was saying. "We've changed that to crabgrass roots. This is about as grass roots as you can get."

"How much money have you gotten?" he was asked.

"I haven't opened the mail yet. I'd say we got about $1,400 at the rally Sunday. People are mailing in anything from $1 to $100. There was a $5 bill stuck under the door once."

"Do you really think something will come of this?"

He said, "We have our hopes. I can tell you one thing, though. We sleep well at night. When we find time to sleep."

• Absentee Candidate

One woman from East Point, in a note accompanying a dollar bill, called it "Arnall's Army" in a takeoff on Arnie Palmer's golf followers. It was a good way to describe the people who have gotten sick at the stomach over the choice of either Lester Maddox or Howard (Bo) Callaway for governor of Georgia and have taken on the mammoth job of mounting a write-in campaign for Democrat ex-governor Ellis Arnall.

To say, simply, "mammoth job" does not cover it. The odds against a write-in candidate cannot even be computed. One of the workers, who did not want to be identified, fully understood the obstacles.

"In the first place, we have an absentee candidate," he was saying. "Ellis Arnall won't encourage this or discourage it, as you know. We don't have any money to speak of. Nobody knows how many workers we have because we're only 96 hours old and haven't had time to count them. We have the problem of educating people on how to go about writing in Arnall's name. They can't write 'Governor Arnall,' for instance, because there may be another Arnall around. Actually, it's not a campaign for Ellis Arnall because his case was stated during the campaign. It's a campaign to let the people know they can write-in, and how to do it."

• 'Help, I'm in Maddox Country'

The campaign to write in Ellis Arnall for governor got rolling last week when dissatisfied voters gathered and picked Arnall from six possible candidates. Empty offices at 5 Forsyth St. were found to work out of, and the scramble was on. Letters have been pouring in from around the state, most of them containing small amounts of money. ("Help, I'm in Maddox Country," said one). One man offered the use of his secretary from noon on, every day. Another offered his plane and will fly workers anywhere, anytime. There are plans to publish a sample ballot showing people how to correctly cast a write-in vote. Other necessities such as envelopes, office machines and furniture have been donated.

The point about a write-in which disturbs so many people, however, is what effect it will have on Callaway's chances. It is apparent that many who would have chosen Callaway as the lesser of two evils will now cast their vote for Arnall. This is the main criticism of "Write-In Georgia."

"To bring Ellis Arnall the majority of votes on Nov. 8 is unrealistic," this worker was saying. "But we do hope enough people will vote with pride and force a runoff between Arnall and Maddox. The mandate of the people will have then been made abundantly clear, the legislature will see the handwriting on the wall and will have to name Ellis Arnall as our governor."

He paused to answer questions from a harried worker. "This is not a splinter group of the Democratic party," he said. "This is the Democratic party. Try to conceive of Lester Maddox representing the party in Georgia and a man like John F. Kennedy representing it in the nation and you'll see what I mean."

ATL. JOURNAL, OCT. 12, 1966 PAGE ONE

GOP Losing, Maddox Says; Callaway Cites Klan Talks

By CHARLES POU
Atlanta Journal Political Editor

Rep. Howard (Bo) Callaway temporarily was off the campaign trail Wednesday after a series of slashing, frontal attacks on opponent Lester Maddox in urban and rural southeast Georgia. He says he looks forward eagerly to a scheduled face-to-face meeting with Maddox on a television show.

Before a one-day letup in formal speechmaking—which he says he canceled out because he thought he was going to debate Maddox here Wednesday—the candidate was hitting hard on what he calls differences in "approach" between himself and his opponent in attempts at solving problems.

On racial matters, he said in Claxton Tuesday, one of Maddox's approaches is to talk things over with the Ku Klux Klan. He said the Atlanta segregationist was attending a klan rally in Americus while he, Callaway, was working at means of seeking peaceful solution to racial disorders there.

THE TELEVISION SHOW referred to by Rep. Callaway is now scheduled for Sunday here, via WSB-TV. The rival political camps exchanged statements Tuesday on who had been afraid to meet whom in face-to-face confrontation. But apparently, all along, there had been just the matter of getting together.

CALLAWAY again joined some Democrats and political observers in expressing opposition to the write-in campaign under way in behalf of Ellis Arnall. Most observers believe such a move could possibly benefit only Maddox.

"You just can't win with a write-in," the Republican candidate said. "I would certainly hope that people will vote for either the Democratic or the Republican candidate."

He also once more declared Maddox is surrounded by "old cronies and political hacks," anxious to get back to the statehouse.

If elected, Callaway declared Georgia "will get along without four years of martial law" and new industry will continue to come into the state. He raises those possibilities which might come under the Maddox "approach."

"It would be easy to have federal troops come to Georgia," he said.

But at the same time, he said there would be no riots in Georgia if he is elected. "I went to West Point and I know how to say 'no'," he declared.

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Write-Ins and Maddox

THE ROLE of the write-in movement in Atlanta as unintentional help for Lester Maddox for governor now is being pondered by a good many Georgia moderates.

This, of course, was not the intention of the movement at the outset. The intention was anything but this. But as the project has gained more notice, its real potential impact has become apparent to more people.

It will take away votes that otherwise might have been cast for Bo Callaway. And if Maddox should run *second* in an election in which neither candidate won a majority because of write-ins, the legislature would be able to elect Maddox nevertheless.

An organized write-in movement that has any success, accordingly, will mean a big potential assist for Maddox. It could give him a second chance—if he should need one.

The governor's race is still very much in the air, despite the feeling of some moderates that Maddox now has it won. When one starts from the premise that the outcome is certain, it is easier to reason that a write-in vote at least would be an effective protest.

But most of the premises of the write-in movement, so far at least, seem wrong: the write-ins clearly *will* help Maddox; the election clearly is *not* decided yet; and there are ways to protest the choice at hand that are better than writing in and taking the chance of putting the Capitol in the hands of totally irresponsible people who would place the state in great danger.

There is no certainty yet that Callaway will present real assurances to moderate-thinking people about what kind of governor he would be. A lot of ears are open for that. Mr. Callaway's failure so far to try to make real distinctions between himself and Mr. Maddox is one of the great mysteries of this campaign.

ATLANTA JOURNAL OCT. 14, 1966

'YAH! YAH! YOU MISSED ME!'

ATL. JOURNAL OCT. 14, 1966

Callaway Predicts State, U.S. Crisis

By TOM GREENE

Republican gubernatorial candidate Howard (Bo) Callaway predicted Friday that Georgia may have "some kind of confrontation with the federal government in the next four years" and needs a responsible governor to face it.

In a speech at Georgia State College sponsored by the Young Republican Club, Rep. Callaway said such a confrontation would mean "the cutting off of federal aid, closed public schools and martial law" if his Democratic opponent, Lester Maddox, is elected.

Gov. Sanders and Lester Maddox say Republicans should pay $77,000 for task of checking Republican petitions —Page 11.

Mr. Callaway, currently 3rd District U.S. representative, said if elected governor, he would "enforce the law of this land" while working within the law to try to change those with which he disagreed.

"I believ you can fight effectively for what you believe in through legal means," he said.

DURING A question and answear session with the students, Mr. Callaway was asked if he were a segregationist as he has been labeled.

He said he's not sure what people mean by such labels but "I believe that every single American citizen should have an equal opportunity . . ." But he added that he thinks "we can do things better (here) without people from Washington coming down and telling us what to do."

Meanwhile, Thursday in Albany Mr. Callaway said a proposed write-in campaign which could drain votes from him is "the only way I can see that Lester Maddox can get elected governor of Georgia today."

Rep. Callaway admitted during daylong campaign appearances there Thursday that he is "extremely concerned" about the move by some Georgians to write in the name of former Gov. Ellis Arnall in the Nov. 8 general election rather than vote for him or his Democratic opponent.

Mr. Callaway, in a question and answer session after a speech to the Albany Rotary Club, said he feels many of those persons involved in the write-in movement are "serious, conscientious" persons who have been led to believe there is no difference between him and Mr. Maddox.

The Republican, in talks throughout the day and in conversations with supporters and potential voters, said he has been surprised and shocked to learn during his campaigning that this question of the difference between him and Mr. Maddox has become the number one issue.

He said at a countywide campaign barbecue rally Thursday night, attended by an estimated 600 to 700 persons paying $1.50 each, that the difference between him and Mr. Maddox "is as the difference between night and day."

In support of his argument, Mr. Callaway ticked off his 14 years in government — 12 years on the Board of Regents and two as Georgia's first Republican congressman—his approach in handling racial matters and the people surrounding him and Mr. Maddox.

Mr. Callaway said while he has been gaining experience in government and civic affairs, "my opponent has never had one single day of experience" in local, state or national government.

POINTING OUT that the next governor will be spending "over $550 million" a year in tax dollars for the next four years, Mr. Callaway said "you've got to have some exprience and knowledge" to do that.

He said while he was promoting calm and reason during the racial difficulties in Americus in 1965, Mr. Maddox attended a KKK rally there and "passed out ax handles."

The candidate promised, "I'm going to fight as hard as anybody ever fought against the unwarranted intrusion of Washington" in state affairs, but said he would do it with a responsible approach and "without closing one single school."

"I say there is a difference between Bo Callaway and Lester Maddox," the Republican said, and "I think that difference is the most important one we've ever had in a governor's race since I've been living."

Mr. Callaway said if Georgians ignore this difference and vote for someone else in a write-in campaign, "all that can happen is it will elect Lester Maddox."

HE SAID the write-in would throw the election of the governor into the House of Representatives, if one of the two candidates did not get a majority, and added "what a mess that would be."

He said he knows he can get along and work with a Democratic controlled General Assembly if elected, "but I can't get Democrats (in the House) to vote for me" for governor.

. . . AND JUST IN TIME FOR HALLOWE'EN!

ATL. JOURNAL - CONSTITUTION
SUNDAY, OCT. 16, 1966

Georgia Politics

by CHARLES POU

Write-In Drive May Resurrect 'County Unit' Governor Vote

The late Paul Stevenson did something right uncommon in state politics. He hung on to a key job in the governor's office administration after administration, through rules of Talmadges and anti-Talmadges.

Reason Paul did it was he had talent, a sometimes rare thing around the statehouse. What he also had was loyalty, a trait fleeting at times as a man's footsteps as he moves from room to room at the Capitol. Paul was loyal to whomever he happened to be working for during a particular four-year period.

Mr. Stevenson's talent was speech-writing, and a real craftsman he was. He would do such a fine job of helping a governor cuss his political enemies that even these political enemies were impressed.

Thus, if one of them happened to become the next governor, the fellow would recall the fine, stinging phrases Paul had helped throw at him, would start trying some of them out for size on his own political enemies, and . . . well, before you knew it Paul would be signed up for another four years.

Speech-writer Stevenson had a great dry wit, but mostly he'd save it for his speeches and keep his mouth shut, something else which is always a good assist in the loyalty business. But occasionally — in private and around friends — Paul would cut loose with some of it.

ONE DAY, somebody was downgrading a state legislator and went on from there to speak harshly of the entire body.

"Oh, no," said Paul, "you mustn't jump on the General Assembly that way. The man you were talking about is in the Senate. Why, over in the House they've got three or four who can read and write. . . ."

This was some years ago, and Mr. Stevenson was about half-kidding, even then. The legislature now has many fine members.

Still, we'd like to use the little story to make this point: The Georgia General Assembly is not the place to elect a Georgia governor.

We refer, of course, to the so-called write-in campaign under way in behalf of former Gov. Ellis Arnall. It is a cruel hoax for any of its sponsors to use as a come-on the possibility that Arnall somehow might get elected governor by this route.

The only possible result of such a movement, we believe even Mr. Arnall would admit, would be to permit the General Assembly to choose between the two top men, Republican Howard Callaway and Democrat Lester Maddox.

It was our guess in this space last Sunday that Mr. Maddox probably is ahead of Mr. Callaway at this point. Latest polls, however, indicate the Republican is out front—but not by enough for a clear win and with many voters reporting in "undecided."

However, you'd find no sampling, no straw-voting, no surveying of any kind which would not show Mr. Maddox way out in front in the number of counties for him.

AND THERE are still 159 of them, remember. And the 205 House members and 54 senators still by far come more from the country counties and little towns than they do from the cities.

And if they had to vote on a new governor—no matter that Callaway had led in the popular vote—the winning vote in the Georgia legislature, following the mandate of the home folks, undoubtedly would be cast for Maddox.

Thus, in effect, you would have another governor elected under the "county unit system."

So we'd like to try here to express an opinion as strongly as we know how—we believe any participation in the formal write-in campaign is an assist for Lester Maddox.

Which is, of course, the individual's own business. Some of the sponsors of the movement privately admit that this is their aim. They apparently operate under the theory that things will have to get worse before they get better.

Reason we sound off here at length about it is a long, through - the - years' dislike of tricky vote schemes.

In our feeble way, we have opposed in times past efforts of friend and foe to put upon us "Dixiecrat" movements, "unpledged elector" schemes, writing into the state constitution the "county unit systems," and a few other election schemes so pea-brained in nature they escape memory.

THE "UNPLEDGED elector" plan, by the way, was much like the so-called "write-in for Arnall" movement. It had in mind withholding enough presidential electoral votes to throw the presidential election into the U.S. House of Representatives.

Some feel even more harshly than we do toward the apparently misguided sponsors of the Arnall write-in movement. Some have labeled it the "Morons for Maddox" drive. That phrase, to us, sounds awfully like an insult to their intelligence.

We know Mr. Arnall is smarter than that. Maybe he wasn't kidding when he said he was going to help the party nominee.

Arnall Write-in Stickers Sought

An aide of Dr. Martin Luther King Jr. says a suit will be filed this week under the 1965 Voting Rights Act seeking to use stickers in voting for Ellis Arnall as a write-in candidate for governor.

Present law requires voters to actually write the names of write-in candidates on the ballot. This poses a problem for illiterates.

Hosea Williams, an officer in Dr. King's Southern Christian Leadership Conference, said success of the suit would permit stickers with Mr. Arnall's name to be printed and stuck onto the general election ballot Nov. 8.

THE SUIT, as described by Mr. Williams, would require Secretary of State Ben Fortson Jr. to provide envelopes and "all that is needed for a write-in" at the polls. But the stickers apparently would be provided by write-in leaders.

Plans for the suit were announced Sunday night at a fund-raising "shoestring banquet" sponsored by a write-in organization for Mr. Arnall, who lost to Democratic nominee Lester Maddox in the Democratic runoff primary.

It was pointed out the suit will be based on the Voting Rights Act which makes it unlawful "to require any degree of literacy."

ABOUT 400 PERSONS attended the banquet, which was halted for 30 minutes from 8:30 until 9 so the debate between Mr. Maddox and his Republican opponent, Howard (Bo) Callaway, could be seen on television.

William Barrett of Augusta, principal speaker at the banquet, charged that Mr. Arnall has been "hounded" by persons who, Mr. Barrett said, abandoned the ex-governor when it appeared that Mr. Callaway would win.

"I want to serve notice on these gentlemen," Mr. Barrett said, "that you cannot pressure us, buy us or blackmail us into voting for Bo Callaway by giving us as an only alternative

Oct. 18, 1966, Atl. Journal

The Atlanta Journal

"Covers Dixie Like the Dew"

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'The Realism of Racism'

RECENT primary elections in the South have shown a yawning gap behind whites and Negroes. "The task of Southern leadership now is to point out the realism of racism . . . and close that gap."

So said Congressman Charles L. Weltner of Atlanta to the Woman's National Democratic Club in Washington Monday.

Thus our young congressman, whose recent withdrawal on principle from this year's congressional election won him the admiration of millions of people, continued to point up the real obstacle to progress in human affairs in the South.

It is not the lack of a two-party system, the lack of enough industry or the lack of enough honesty (of the fiscal kind) in government, desirable as all these are. It is just racism.

So, as Congressman Weltner said, the task of Southern leadership now is "to point out the realism of racism. . . ." Many people have not been ready to look it in the eye. Our politicians, including many of those who performed admirably on other matters not so close to the real problems of home, have been unable to face up to the simple fact of racism and stop dealing in sophistries about it. Many even have rebelled at the word. (The truth has been buried that deep.)

What is needed, then, is a time of candor with ourselves. Perhaps more people are ready now to say, in effect, stop the *stuff;* let's be honest.

Why does Georgia have the governor's race it now has? Racism, in one form or another, accounts for each candidate's being where he is. Whatever may be either man's personal values, each has ridden that tiger.

But the whole experience may have the value of doing exactly what Mr. Weltner is talking about: It may "point up the realism of racism" in the South, and thus make it more difficult to imagine that racism as we see it in its subtler forms is not really there, crippling us.

In this decade when even the ax-handle racists are using symbols rather than "nigger-nigger"—talking about states rights, constitutional (?) government, individual liberty, etc., etc., when everyone knows who most of them are talking about—it will be good if Southern leadership does face up to the realism of racism here and stop deceiving even itself about it.

There are quite a few signs, such as Rep. Weltner's speech, that a new willingness to be honest is peeking out. But in Georgia at this point, it is just a willingness born of immediate political crisis, and it is too early to tell whether it will grow.

Exercise in Futility

THERE IS a movement, mainly by die-hard Ellis Arnall fans, to write in the name of their defeated candidate in the general election.

The idea seems to be that Mr. Arnall, having roundly b e e n trounced, somehow will bounce back and win the governorship this time.

Mr. Arnall has a lot of bounce for sure. But he's older than he used to be and we learned this season that a lot of the old spring is gone.

We admire the never-say-die spirit behind this move though the logic escapes us:

Every write-in vote for Mr. Arnall in the general election is likely to bring Lester Maddox that much closer to the new mansion on Paces Ferry, and we doubt if that is what the write-inners want.

Examination of this movement indicates that there is more meringue than pie to it, and that some of the state's most famous (and ineffective) agonizers and eyeball rollers are working on it.

It seems far removed from the grass roots.

Certainly it is miles from random samplings of The Journal street poll as published on Monday. Here are a pair of quotes concerning the movement from this poll.

"I don't think it would be effective."

"I don't think it would be a good idea. When somebody's been defeated he ought to stay out."

That's the trend from the man in the street.

He's the one who decides finally.

We've had a primary and a runoff, and a general election is coming up. This gives most of us three chances to vote for the next governor.

Is a write-in necessary? Or is it an exercise in futility, unless you're a Maddox partisan and see a chance to ge. extra help for your candidate that way.

Fortson, Write-In Group Clash Over Election Code

By DON WINTER

A group backing a write-in campaign for Ellis Arnall has failed to persuade Secretary of State Ben Fortson to change his instructions for conducting the Nov. 8 general election.

Lawyers speaking for the Write-In Georgia Committee differed with Mr. Fortson Tuesday on sections of the 1964 Election Code dealing with pre-printed stickers, the write-in procedure for votomatic machines, and whether a governor would be chosen by the legislature or in a runoff if no candidate got a majority of the vote.

Mr. Fortson argued the lawyers' interpretations of all three matters, but he would ask for an official opinion from the state attorney general.

A POINT in question was whether lack of a majority means election of a governor by the legislature. Mr. Fortson read the portion of the state constitution saying that returns from each county are forwarded to him, and he gives them, still unopened, to the State Senate when it meets the following January.

"Officially, you don't even know who wins until the legislature meets," Mr. Fortson said. "The constitution says, specifically, that they're to pick a governor if they find—at that time—no one has a majority."

The lawyers in answer quoted the election code, which says: "No candidate shall be . . . elected to public office . . . unless . . . (he) shall have received a majority of the votes cast. . . . In instances where no candidate receives a majority . . . a runoff . . . election shall be held, between the two candidates receiving the highest number of votes. . . ."

Mr. Fortson said it had always been done his way in the past, and that if the code was in conflict with the constitution, then the constitution would have to be followed.

On another point the lawyers asked that voters be allowed to take pre-printed stickers bearing Arnall's name into the polling booth. Although the voting code says "the insertion of such name (of the write-in candidate) . . . by the use of a sticker, paster, stamp or other printed or written matter is prohibited," the lawyers said the section deals only with paper ballots.

Mr. Fortson said that he remained firm in his belief that stickers were illegal. Paper ballots are official, he said. If machines are used their ballots must conform as nearly as possible to specifications for the paper ballot.

ATL. JOURNAL OCT 19, 1966

ACLU Asks Curb On Write-in Laws

A federal court has been asked to strike down sections of Georgia's election laws regarding write-in voting.

No hearing date has yet been set for the suit, court officials said Wednesday. The suit was filed late Tuesday by lawyers for the American Civil Liberties Union.

The action seeks to promote prefabricated write-in voting by allowing a voter to attach a sticker bearing a write-in candidate's name. The election laws at present require the voter to write the candidate's name on the ballot.

The suit charges this violates the 1965 Voting Rights Act ban against requiring voters to be literate. It also alleges that write-in voters are denied an absolute secret ballot.

THE ACTION was brought in U.S. District Court on behalf of five plaintiffs, including three plaintiffs identified as illiterate Negroes. They were listed as Laura Seabron, Mary Patrick and Dorothy Clark. The other plantiffs were identified as Mrs. Florence Robin, director of the Georgia ACLU, and Rev. John Morris, of the Episcopal Society for Cultural and Racial Unity.

Defendants were listed as Secretry of State Ben Fortson, Georgia Election Board members Mrs. Harry B. Williams and H. H. Perry Jr., and Fulton County Ordinary Eugene Gunby.

The petition filed Tuesday asked appointment of a three-judge panel to hear the case, and for a temporary injunction against enforcement of the current election laws.

FILING OF the suit, which earlier had been announced by Rev. Hosea Williams of the Southern Christian Leadership Conference as a move to enhance the write-in chances of defeated candidate Ellis Arnall, was preceded by a visit to Mr. Fortson by a 12-mmeber group which promotes the write-in sticker plan.

In a prepared statement, the write-in group said election laws concerning write-in votes are confusing, contradictory and vague, and "it is impossible to determine how voters desiring to write in the name of Ellis Arnall may lawfully and legally do so."

Mr. Jacobs also complained that Votomatic machinery, which involves punching a card ballot, makes no provision for write-in votes unless the card is accompanied by an envelope.

HE SAID election officials give out envelopes only to those persons who ask for them and that this indicates those persons intend to write in the name of a candidate other than an official nominee. He said this destroys some of the public secrecy of the ballot and possibly could lead to intimidation of some voters.

The suit filed in U.S. District Court late Tuesday was presented by Charles Morgan Jr., Southern regional director of the ACLU and Morris Brown, head of the Georgia ACLU's Lawyers' Committee.

ATLANTA JOURNAL Oct. 19, 1966

'ALL ALONE . . . BY THE TELEPHONE . . .'

The Atlanta Journal

"Covers Dixie Like the Dew"

Since 1883

Jack Tarver, President • Jack Spalding, Editor

Dead End Write-In

THERE WILL be a general election on November 8. Part of it will be selecting a man to govern us for the next four years.

Whoever it is will be responsible for the course of the state. He will set the tone. On him will depend many things, including advancement of the common schools and the University System of Georgia.

The image of the state in the rest of the world will depend on this new governor. Upon this image largely depends the type of educator we can attract to add quality to our schooling and the kind of industry and capital we can attract to add strength to our economy.

We have had a Democratic primary and a runoff and Lester Maddox has emerged as the candidate of the Georgia division of this party.

Mr. Maddox won this nomination by all the rules, including hard work.

On the other hand, we have Rep. Bo Callaway, the first Republican candidate for the governorship in nearly a century. Mr. Callaway's candidacy is based on a petition signed by more than 100,000 voters.

And on the other hand? We have a write-in movement by the Arnallites who will not or cannot accept their defeat under the rules of the Democratic primary and are trying to revive their favorite by this method.

Circumstances suggest an autopsy instead.

Barring a suspension of natural laws this move is doomed to failure.

Its total effect will be to help Mr. Maddox. Is that what these people want? Or don't they know any better?

ATL. JOURNAL OCT. 19, 1966 PAGE ONE

Can Legislature Choose Governor?

By WILLIAM B. WILLIAMS

Some legal experts are raising the question whether the malapportioned Georgia legislature could legally elect the next governor should the requirement arise.

It has been learned that some legal attorneys are beginning to probe into the matter.

If no candidate receives a majority vote in the governor's race, the legislature is required to decide on one of the top two candidates.

There are two questions:

—Since a majority of House seats are representative of only 42.3 per cent of the state's population, somebody's vote is bound to be debased.

—Since the malapportioned House is apportioned along sectional lines, such an election would be almost like the county unit system which has been ruled unconstitutional.

A three-judge federal court already has ruled the Georgia Legislature is malapportioned, and has given it one year to apportion itself correctly.

One attorney said he doubts the court would look favorably upon the power of such a legislature being extended for four years through election of a governor.

He said there is an inherent inconsistency in the laws providing for the election of a governor.

ONE LAW provides that a candidate must get a majority of the popular vote to be legally elected governor.

But if the candidate gets 49 per cent of the popular vote, his nearest opponent could be elected governor by the legislature — which 42.3 per cent of the people control on a majority basis.

Attorney Francis Shackelford of Atlanta, a veteran of reapportionment cases, said that offhand he believes election by the legislature would be legal.

HE ADDED, however, that citizens could seek a federal court injunction, and the matter would be in the hands of the judges.

Two other attorneys who are pondering the matter said they feel such an election would be illegal.

At least 68 of the 141 House districts are outside the court's one-man, one-vote requirement.

Some districts are malapportioned 30 per cent or more.

IN THE SENATE, four of 54 districts are more than 15 per cent under-represented, according to the findings of the court.

House members, however, can outvote the Senate about four to one.

Page Tightly Bound

ATL. JOURNAL

Callaway Is Ahead in Georgia

By ROWLAND EVANS and ROBERT NOVAK

DESPITE PANICKY fear by thoughtful Georgia voters that all is lost, the fact is that arch-segregationist Lester Maddox, the Democratic candidate for governor, is now running well behind Republican Rep. Howard (Bo) Callaway and should lose.

This forecast is based on several factors, not least of which is a confidential voter sample by pollster Oliver Quayle for a prominent Atlanta citizen who has ties to neither Maddox nor his opponent. It shows Callaway with a surprising lead.

Callaway is a conservative Republican and fervent supporter of Barry Goldwater in 1964 who came into congress on the Goldwater Southern tide. He votes a hard-line conservative position.

But the enlightened Democrats who have made Atlanta one of the show cities of the South are now using every financial and political resource they have to elect Republican Callaway.

"Either we go back to the Dark Ages with Maddox or to the Middle Ages with Callaway," explained one frightened Atlanta progressive. In short, Callaway is the lesser evil.

* * *

FEAR OF DELIVERING the state into the racist hands of Lester Maddox, former restaurant owner who passed out ax handles to whites to keep Negroes away from his door, has been a pervasive emotion in Atlanta every since Maddox upset moderate former Gov. Ellis Arnall in the Democratic primary.

Now, however, panic is giving away to action. Secret contacts have been made with leaders of the large, responsible Negro population in Atlanta who may hold the balance of power.

Sen. Herman Talmadge, the state's most powerful Demo-

crat, has pulled back from giving Maddox the benefit of his personal organization. The image-makers of Atlanta — bankers, industrialists, academicians — are pulling out all the stops to stop Maddox.

The reasons for this campaign go well beyond the race question. A thrice - defeated candidate for lesser office than governor, Maddox is a political primitive who knows nothing about government. He has already surrounded himself with a horde of office-seekers who can smell the gravy that flows out of the state capital.

* * *

WORSE YET, HIS first selections for the party's state executive committee consisted exclusively of right-wing Democrats, some of whom are members of the Ku Klux Klan. Because the 120-member executive committee picks Georgia's delegates to the 1968 Democratic National Convention, this points to the spectre of grave troubles for President Johnson with a Maddox-led Georgia.

But the bi-partisan plan of battle against Maddox must be waged largely out of public view to avoid making a martyr of Maddox. He talks the language of the small town and the poor whites — back-country wool hats and low-income city workers.

Consequently, a noisy assault on Maddox by the Atlanta power structure could boomerang with these low-income voters who are quite in sympathy with his views on the racial crisis.

One such voter told us he was for Callaway until the liberal-leaning Democratic mayor of Atlanta, Ivan Allen, attacked the "rabble of prejudice, extremism, buffoonery, and incompetency" that nominated Maddox over Arnall.

* * *

"THE MAYOR WAS talking about me," this voter said. "I'm voting for Maddox now."

With all this, the Quayle Poll showing Callaway a clear favorite as of last week (44 per cent Callaway, 32 per cent Maddox, balance undecided) will come as a shot in the arm for the coalition of moderate Democrats and conservative Republicans who feel Callaway's election is essential to keep Georgia out of the Dark Ages.

Moreover, this poll parallels a periodic series of voter samples that the Callaway camp, under campaign chief Bill Amos, has been taking all summer and fall. The Amos polls, too, show a high undecided portion of the vote.

To hold the Callaway strength and build it beyond the 50 per cent mark, however, the senseless write-in move for Arnall that some liberal Democrats are encouraging must be stamped out. Every Arnall vote would come from Callaway.

It is also essential that Callaway, a politically-inflexible textile millionaire who is resisting all deals with anti-Maddox Democrats, start to count Democratic votes. If this is done, Maddox can and will be beaten.—(c 1966.)

The Atlanta Journal

"Covers Dixie Like the Dew"

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Jack Tarver, President • Jack Spalding, Editor

The Quangle Wangle

IT IS SAID in some quarters—and we cannot vouch for it—that Sen. Herman Talmadge has pulled back a bit from his extension of aid to Lester Maddox's campaign for governor.

Sen. Talmadge has been extraordinarily adroit at moving his hand behind the scenes when it comes to choosing a governor. In 1954, it was difficult to see him at work at all before the last few days of the campaign in which he quietly aided Marvin Griffin.

But this time his hand was found, very early, in efforts to organize some pro-Talmadge but anti-Maddox Democrats behind Maddox. Was this only so that Talmadge people would be placed in key positions in the "new" Democratic organization under Mr. Maddox?

And now that that has been accomplished, is Sen. Talmadge through helping Mr. Maddox? That hardly seems likely.

No doubt the guessing about it will be prolonged.

The senator looms so large in our state's affairs and yet so seldom lets his hand be seen that we sometimes believe it would be appropriate for Georgia to adopt a new state bird: the Quangle Wangle.

You remember the Quangle Wangle. Edward Lear wrote about him. He wrote:

On the top of the Crumpety Tree
The Quangle Wangle sat,
But his face you could not see,
On account of his Beaver Hat
For his hat was a hundred and two feet wide
With ribbons and bibbons on every side
And bells and buttons, and loops and lace,
So that nobody ever could see the face
Of the Quangle Wangle Quee.

sales of season tickets, more than ever before.

Part of the enthusiasm is related to Robert Shaw, even though he will not conduct the orchestra this year; the mere fact that he is coming and great things are afir for music in Atlanta engenders great expectation.

And so does the building of Atlanta Memorial Cultural Center, which will be the symphony's home season after next. (Next year, the orchestra will hold forth in the new Municipal Auditorium.)

This year Robert Mann, the associate conductor, will lead the Symphony when guest conductors are not on hand, and he will do it well.

Maybe we shouldn't say it this way. But it is good to see them off and running.

Now, a 'Paste-In'

THREE FEDERAL judges will hear a challenge of the state's election procedures.

It is another development of our current political season, which at this stage matches Republican Bo Callaway against Democrat Lester Maddox for the governorship.

Mr. Maddox emerged as the Democratic nominee after a primary and a runoff in which he soundly trounced Ellis Arnall. Mr. Callaway was nominated by petition.

But are the Arnall people satisfied with the results obtained according to rules and regulations and after two trips to the polls by the electorate?

No. They have the idea that given another chance their old friend will win, though what he has added in the way of political attractiveness since then is a mystery.

At any rate, they're promoting something called a "write-in," which, whether they realize it or not, should be favorable to Lester Maddox.

Now somebody is asking the judges to extend the "write-in" idea by allowing a "paste-in. A "paste-in" is a "write-in" for people who can't write.

We can understand secret Maddox agents working hard for this "write-in" and especially for the "paste-in."

But the enthusiasm of the Arnallites is difficult to figure, unless it's one of those masked desires to suffer exquisitely again and again.

ATLANTA JOURNAL Oct. 20, 1966

'FEAR NOT, FAIR MAIDEN; I GO TO SEEK THE GRAIL!'

ATL. JOURNAL OCT. 21, 1966 PAGE 1

PINEY WOODS PETE Says:

DEAR MISTER EDITOR:

A group calling itself "Write-In Georgia" is flooding the mail with appeals to voters to write in the name of Ellis Arnall for governor on Nov. 8. One, addressed to "Women of Georgia," says:

"The politics that left us faced with the intolerable choice between Bo Callaway, Democrat turned Republican, rightist - with - education, voter - against - federal - aid-to-education and against the minimum wage . . . and Lester Maddox, that vicious joke of Georgia and all people of good will—in effect took away your votes, disenfranchised us. What can you do? Write In Ellis Arnall."

If effective enough, this could throw the election into the Georgia House, where Maddox likely would win. Why bite off one's nose to spite the face?

Yours truly,
PINEY WOODS PETE.

ATL. JOURNAL OCT. 22, 1966 PAGE ONE

Callaway Assails 'Stick-in' Project

By STEVE BALL JR.
Atlanta Journal Staff Writer

VALDOSTA, Oct. 22—If the proposed "stick-in" voting is declared legal it could well force the governor's election into the House of Representatives, Howard (Bo) Callaway said.

And if that happened, the House would almost certainly elect Lester Maddox, the Republican candidate for goveronr told a press conference here.

Rep. Callaway, invading what on the surface appears to be Maddox Country, shook thousands of hands in Douglas and Valdosta Friday, and predicted he will carry the 8th Congressional District.

Following a minute-by-minute schedule, the GOP nominee moved from plant to plant to shake hands with workers.

SOMEWHERE along the way someone wrote "Maddox Country" on a window of the minibus he uses for a rolling headquarters and it stayed most of the day.

At the press conference Rep. Callaway again confessed he cannot understand why he can't win over the supporters of the write-in campaign for Ellis Arnall.

He said he has not changed his conservative stance one bit since the campaign began.

"I stand for a firm belief that we can solve our own problems in Georgia better than they can solve them in Washington.

"This means I very firmly believe we can and must do more in Georgia."

He wants the same things for Georgia that the supporters of Mr. Arnall want, the candidate added.

ELABORATING ON the prospect of an election by the House, Rep. Callaway said, "I don't see much chance of a Republican winning out of the confusion . . . I would just as soon have a vote for Maddox as the write-in."

He said he is "reasonably" concerned about the write-in now and if the courts should allow the use of stickers "then we would be in serious trouble."

The election of a governor by the House would present all sorts of problems, he said. One of these would be the legal question of whether the majority of Democrats who would theoretically be bound by their party oath to support the Democratic nominee would be allowed to decide the issue.

The candidate also wondered aloud what the courts would say about election of a governor through a malapportioned legislature.

Asked how he feels about county consolidation, Rep. Callaway said, "I don't think the time is right now to force counties to consolidate against their will. I think the approach is to make it easy to consolidate services."

He vigorously denied that Callaway Gardens, which he heads, gets by without paying taxes because it is under the Callaway Foundation.

HE SAID Callaway Gardens is the largest taxpayer in the county and said it pays state and federal income taxes as well as ad valorem taxes.

Rep. Callaway wound up his campaigning here by attending the Valdosta High School football game. Local school board officials decided earlier not to announce his presence on a loud speaker at the game because, they said, this would be getting the high school into politics.

Rep. Callaway showed up anyway, shook some hands at the gate and then watched most of the first half of the ball game. He went unnoticed by most spectators but he seemed to enjoy the ball game.

Carmichael Throwing Support to Callaway

By The Associated Press

James V. Carmichael, who won on popular votes but lost the governorship to Eugene Talmadge in 1946 on county units, announced Saturday his support of Republican Howard H. Callaway for governor.

Carmichael stressed that he is a Democrat and probably would have voted for Ellis Arnall if Mr. Arnall had been the Democratic nominee.

"But Mr. Arnall is not a candidate," he said. "We have only two candidaes and Bo Callaway is my choice."

Mr. Carmichael denounced proposed write-in movements and those who say they are "going fishing" on election day "as a vote for Lester Maddox."

He said he opposes Mr. Maddox "because if his philosophy is allowed to prevail, it will result in anarchy and mob rule."

Mr. Carmichael received 313,389 votes to 297,245 for Mr. Talmadge in the 1946 election. However, the victory went to Mr. Talmadge, the late father of Sen. Herman Talmadge, on county votes 242 to 146.

THE COUNTY UNIT system in Georgia since has been outlawed.

"America became great under a two-party system, and efforts to organize a third party, write-in movements, paste-in movements or what have you have always served to help those they are aimed against," Mr. Carmichael said in his announcement.

"The choice is between the Democratic candidate and the Republican candidate. One is bound to be elected.

"People who go fishing or write-in are only trying to salvage their conscience.

"Maddox is interpreting the laws in his own way. He chooses the laws he likes and obeys them. Those he dislikes, he disobeys.

"Callaway is experienced in business and in government, and I consider him qualified to handle the millions of dollars that flow through the treasury.

"We ALL have a duty to vote, and we have no right to go fishing or write-in to salvage our conscience. The two candidates we have are the only choice we have. A write-in is a farce. It never has elected a candidate and it never will.

"Anyone who thinks otherwise is making a grave mistake."

The expression "go fishing" is a colloquialism referring to a refusal to vote for either candidate.

Georgia's county unit system, which alloted votes to candidates on whether they carried and individual county, was outlawed in 1962. It was weighed heavily in favor of rural voters.

ATL. JOURNAL - CONSTITUTION
SUNDAY OCT. 23, 1966

'SOMEBODY TRIED TO DROWN HIM IN TH' OLD COUNTY UNIT MILL POND! CAN I KEEP HIM, MOTHER? CAN I?'

SUNDAY, OCT. 23, 1966

Georgia Politics

by CHARLES POU

A Negro Leader Speaks Out Against That Write-In Campaign

You express opinion in a controversy and you make some happy, some unhappy. Thus it came as no surprise that projection here of an anti-write-in view (in opposition to the formal Ellis Arnall write-in movement, that is) last Sunday brought some calls and letters of protest.

We had said it was our belief that the formal write-in campaign was of direct aid and comfort to the candidacy of Lester Maddox. Some, we reported, had even tagged the thing the "Morons for Maddox" division of the Maddox campaign.

One little lady called to object to the piece in general and specifically to what she thought was omission in it of the fact that there are some fine, dedicated citizens working in the drive. We thought we had pointed this out. But, rereading the piece, we realize we didn't emphasize it enough, hereby apologize, hereby say it again: there are some fine, dedicated citizens working in the drive. Bless 'em.

A COUPLE OF letters were from old friends saying they had to disagree with the writer this time. In the piece we said there was little doubt, in our mind, that the two top vote-getters would be Maddox and Callaway and that when the thing (if the write-in movement forced a runoff) got to the Georgia General Assembly, that body undoubtedly would choose Democrat Maddox.

One friend pointed out no one, including us, could predict all the time what the good old Georgia Legislature is going to do. True. But you watch 'em for 15, 16 years and you get where you can make pretty shrewd guesses.

Were it not for a painful trait of modesty, the writer here would say some of the letters and calls were complimentary. Oh, stuff like "rendered a public service." "How perspicacious can one get?" (whatever that meant). Some letters contained even more fulsome expressions than these, heady stuff which made the reporter blush with deep embarrassment as he shyly passed the mail along to superiors.

SO WE'LL SKIP all of those and instead we'll present the views of a far more eloquent spokesman on the subject than the writer, after making it clear the spokesman does not want what he says here to be interpreted as endorsement of the candidacy of Republican Callaway.

Jesse Hill, Negro newspaper publisher, a top official in a multimillion-dollar insurance company and a longtime leader in the Negro civil rights movement, was a telephone caller Saturday and said:

"I want to point up some of the tragic possibilities of the write-in movement. I know well that there are dedicated people working in behalf of it, but I do not believe they know that, in the very write-in movement in which they work, there are working forces of Mr. Maddox, aiding and encouraging the movement. I have evidence of it. . . ."

THAT'S THE WAY he concluded a dictated statement on the subject. He began:

"What I hope we (Negroes) can do is set the stage for effective and realistic political action. The write-in movement has had my sympathy, understanding and support from its inception.

"There are many dedicated Georgians involved, including some of my close associates. A close analysis of the write-in movement, however, clearly indicates that there is no genuine and effective political alliance possible.

"If the election were held today, a minimum of 80 per cent of the voters attempting to write in would be Negro voters. In many areas of our state, most of these write-in voters would have their votes disqualified or thrown out because of improper balloting.

"This would have the effect not only of draining off votes in the governor's race but in many instances also of disfranchising Negro voters who desire to vote in important local races."

MR. HILL HAS directed most of the major Negro registration drives during the past 10 years. In Atlanta, an estimated 50,000 Negro voters have been added in that decade. But in politics he is a realist, and he continued:

"Even in politically affluent Atlanta at each election thousands of Negroes go to the polls, receive ballots—and then fail to have their votes recorded, even with Negroes supervising the election polls.

"Early next week I plan to join others to call upon my associates, who had asked my advice about entering the write-in movement, to enter into a serious and honest evaluation of the movement and to ask themselves this question: Can the Negro cast an effective vote in the governor's election by voting directly as between Mr. Maddox or Mr. Callaway?

"Granted," he went on, "both men are arch-conservatives and segregationists. But the Civil Rights Act and other federal programs of nondiscrimination have removed from the reach of discretionary powers the basic issues of either would-be governor.

"THEREFORE I believe that (Negro) voters can arrive at a choice, one that is not necessarily enthusiastic but which would be in the best interest of rank and file citizens.

"Any would-be leader who fails to take the trouble to face up to a nasty political problem is failing to keep faith with those he would lead."

Mr. Hill, as an early advocate of the write-in movement, was one who suggested the pending federal suit which would permit liberalizing ballot procedures on write-ins. He said about this:

"Under the suit, if it were successful, there would have been some intriguing and hopeful (write-in) possibilities. But with only slightly more than two weeks before the election, I have advance opinions of some of the attorneys sympathetic to the movement that its chances of success are virtually nil . . .

"I think we (Negroes) in January should insist that whoever is governor, Mr. Callaway or Mr. Maddox, be the governor for all Georgians. I think that we should participate in the selection of the governor."

Thus Mr. Hill was another who came close to labeling the write-in thing the "Morons For Maddox" movement.

ATLANTA JOURNAL, Oct. 25, 1966

THE RELUCTANT DRAG-IN

The Atlanta Journal

"Covers Dixie Like the Dew"

Since 1883

Jack Tarver, President • Jack Spalding, Editor

Street Journal report, but the housewives indicate they are going to keep at it.

The supermarket people, meanwhile, maintain that the housewives are after the wrong men. They maintain that the women should really be mad at the Johnson administration and that's where they should take out their anger.

It could well be that the supermarket people are right in what they say. And it also could be that the housewives around the nation are merely waiting until the next election, at which time they will, indeed, take out their anger.

Burden of Guilt

THIS SEASON has produced a Democratic primary and a runoff which resulted in Lester Maddox as the gubernatorial candidate of that group, as well as titular head of the Democratic party of Georgia.

It also has produced, via the petition route, another candidate, Rep. Bo Callaway of Pine Mountain. Mr. Callaway is a Republican, the first of that breed to rise this high politically in Georgia in our time.

The season also has produced a write-in movement on behalf of ex-Gov. Ellis Arnall. It was Mr. Arnall's misfortune to trail Mr. Maddox in the runoff. Nevertheless there are those who somehow think he can win some way via the write-in method.

However, the logic of the situation indicates that each write-in vote for Mr. Arnall aids in the election of Mr. Maddox. This is an event which fills the minds of many of our citizens with dread.

In this group is to be found John A. Sibley of Atlanta. Mr. Sibley is a lawyer with a penchant for public service and a reputation for rectitude.

On Monday Mr. Sibley gave his endorsement to Mr. Callaway as by far the best man for the governorship, and had this to say about the write-ins.

"Those of my fellow Georgians who are threatening to go fishing or to vote a write-in ticket on election day are aiding Mr. Maddox and must accept the blame should Mr. Maddox be elected."

Mr. Sibley is correct. The write-in does favor Mr. Maddox. And those active in it definitely must accept the blame should Mr. Maddox be elected.

AJC, JOURNAL. OCT. 26, 1966 PAGE 1

Envelopes Ordered For Votomatic Users

By RALEIGH BRYANS

Atty. Gen. Arthur Bolton has ruled that all voters in counties using Votomatic recorders must be handed write-in ballot envelopes as a matter of course, and not just on request.

Because it means that everyone who goes to the polls will be handed the same ballots—both a Votomatic ballot and a write-in ballot—the ruling means that the voter who goes with the intention of writing in a vote in the governors race won't be conspicuous about it.

Mr. Bolton's ruling was relayed to Thomas Malone, Fulton County's supervisor of elections, via Associate County Atty. John Ferguson.

Mr. Malone said he is confident the ruling will allay fears of some voters that the usual secrecy in voting would be lost if voters chose to write in.

This feared loss of secrecy figures in a suit challenging the state election code provisions for write-in voting in Votomatic counties.

Mr. Malone said the write-in ballot-envelope is designed so that the separate Votomatic ballot can be inserted in a special "pouch" inside it.

This means the voter can place both ballots in the ballot box at one time and theoretically no one in the polling place would know if he had written in or not.

Anyone who voted both ballots would have his vote voided.

ATL. JOURNAL OCT. 27, 1966

GRAVY TRAIN

Secrecy Argument Fails in Vote Suit

By WILLIAM B. WILLIAMS

A three-judge federal court Friday dismissed complaints that counties using Votomatic machines are violating ballot secrecy for write-in voters.

The decision came after hearing arguments that voters should be allowed to use gummed labels to paste in the name of their favorite candidate in the Nov. 8 general election.

The hearing on whether use of gummed labels is legal was to resume later Friday.

Earlier, state officials and county ordinaries in Votomatic counties agreed to adopt procedures which would assure write-in voters of a secret ballot.

Attorneys for the American Civil Liberties Union which brought the paste-in suit agreed that since Votomatic counties will provide secrecy, this part of the contention should be dismissed.

DURING the arguments on the case, U.S. Circuit Court of Appeals Judge Griffin Bell expressed concern that Georgia law was changed this year so that a person could only assist one illiterate voter in an election. The old law had allowed a person to help as many as 10 illiterates per election.

He asked defense attorney Howard Hill why the old law had been changed and chided people who "sit around thinking up something that will result in a law suit."

Judge Bell said the new law is "putting too much of a burden on the voter."

Mr. Hill said the new law would discourage campaign workers from taking over.

"You'd have to have a lot of campaign workers," said Judge Bell. "This makes it as hard as possible on the voter."

Also asking questions about the one-person assistance law were U.S. District Judges Lewis R. Morgan and Sidney O. Smith Junior.

PLAINTIFF'S attorney Charles Morgan said that with the use of pre-spelled gum stickers confusion in spelling can be avoided and illegible handwriting problems would be minimized.

Otherwise, he contended, "this is going to be the world's largest spelling bee."

The three judges were trying to determine what Georgia officials would do about counting the vote should wide variations in spelling result from a write-in campaign.

Under attack are 15 sections of the Georgia election code dealing with write-in procedure and assistance of voters.

Attorneys for the Georgia Election Board, named as a defendant in the action, say that 16 states ban the use of stick-ins and this has been upheld by courts.

Sixteen other states permit paste-ins, the defendants added.

PLAINTIFFS in the action contended that the ban on paste-ins violates the 1965 Voting Rights Act, which prohibits barring persons from the polls because they can not read and write.

Some Georgia voters who oppose both Republican Howard (Bo) Callaway and Democrat Lester Maddox in the governor's race have launched a write-in campaign for former Gov. Ellis Arnall, defeated in the Democratic primary runoff.

Members of the election board are Secretary of State Ben Fortson, Mrs. Melba Williams and Holcomb Perry Jr. Another defendant is Fulton County Ordinary Eugene Gunby.

The board claimed the voting rights act, which bans discrimination by use of a literacy test, applies only to racial discrimination. Also, the argument continued, the present system does not amount to a literacy test.

Since voting officials are required to give each voter an envelope for a write-in ballot, there is no lack of secrecy, the defendants contended.

PLAINTIFFS contended the state's election laws deprive write-in voters and illiterates "of their right to cast a ballot in absolute secrecy."

Plaintiffs maintained that the requirement for writing out the name of a candidate amounts to a literacy test.

Also, attorneys continued, the law which allows a literate person to aid an illiterate deprives the illiterate of his right to cast a secret ballot.

Georgia Atty. Gen. Arthur K. Bolton argued that paste-in ballots often clog automatic voting and counting devices.

Mr. Bolton said none of the five plaintiffs was truly illiterate and that two could spell, therefore he was challenging whether they are qualified to file suit.

Attorneys for plaintiffs asked the court to delay the general election if the question of stick-ins is not resolved by election time.

ATL. JOURNAL OCT. 29, 1966

Vote Stickers Out, Other Aid Okayed

By the Associated Press

Gummed stickers will not be legal in place of handwriting on write-in ballots in Georgia's general election Nov. 8, but more aid will be available to the illiterate voter.

A panel of three federal judges refused Friday to strike down the Georgia law prohibiting stickers, but instead eased restrictions on assisting voters at the polls.

The American Civil Liberties Union, which had challenged the law on behalf of five Georgians, said it was pleased with the results of the hearing.

The panel ruled unconstitutional a 1965 law which limited one person from assisting more than one illiterate voter at the polls.

"We think the former statute, permitting a person to assist as many as 10 illiterates, was reasonable under the circumstances and would serve to keep down partisanism," the judges ruled in a unanimous decision.

THE JUDGES, Griffin B. Bell of the 5th Circuit Court of Appeals and District Judges Lewis R. Morgan and Sidney O. Smith Jr., agreed that the new statue was "unduly restrictive."

They concluded that few if any of the plaintiffs in the case would want to use stickers or stamps since they still would need aid to vote in other races.

"What the illiterate needs," the court said, "is someone to assist him inside the voting booth in casting his ballot in all of the races."

Attorney Harold Hill of the state attorney general's office had argued that gummed stickers would thicken rolls of paper in voting machines and jam them.

WITH THIS guarantee of secrecy and liberalized assistance, the ACLU said the illiterate voter "does not need stickers."

"The rights to a secret ballot and to adequate assistance have been enunciated," the ACLU said. "That was our only concern, and we are pleased."

Supporters of a write-in movement for former Gov. Ellis Arnall, defeated in the Democratic primary runoff, were hoping for a favorable decision in the suit to give impetus to the write-in campaign.

"Write-In Georgia," an Atlanta-based Arnall movement, said it never expected that the court would approve stickers and that it was satisfied with the Friday rulings.

"We agreed with the ACLU," the drive's sponsors announced, "that it was necessary to test portions of the Georgia Constitution relating to voting procedures."

SPOOKY ENOUGH FOR HALLOWE'EN

ATLANTA JOURNAL-CONSTITUTION SUNDAY OCT. 30, '66

Write-In Promoters Seek Democratic Party Revamp

By TOM GREENE
Atlanta Journal-Constitution Staff Writer

MACON, Ga., Oct. 29 — The Write-In Georgia movement, promoting Ellis Arnall for governor, concurrently is seeking to form a group which will remain "true to the highest principles, ideals and aspirations of the Democratic Party."

Delegates attending a Macon area workshop for the write-in movement Saturday passed a resolution declaring that the group is "that part of the Democratic Party of Georgia" committed to those ideals.

The resolution also called for the formation of a statewide committee to "formulate rules and regulations for this newly constituted part of the Democratic Party of Georgia," which will report back to representatives of the write-in movement.

The spokesman for the movement, said later the resolution is being presented to delegates at similar workshops all over the state. The spokesman emphasized that this is not a move to form a splinter or separate party, but said it is an attempt to show there are those within the state Democratic organization who do not agree with the party's nominee, Lester Maddox.

There reportedly were 132 official delegates to the workshop from several counties, and 642 others who paid $1 each to get in.

HOSEA WILLIAMS, a leader in Dr. Martin Luther King's Southern Christian Leadership Conference, told those attending that "we have an opportunity to do a great thing."

Mr. Williams said the movement could "form such a strong force that not only will Lester Maddox have to recognize us, Lyndon Baines Johnson will have to recognize us as the Democratic Party in Georgia."

The SCLC leader also said leaders of the write-in movement have been told they are helping to assure the election to Mr. Maddox and should support Republican nominee Howard (Bo) Callaway as the "lesser of two evils."

But, he said, "there's no such thing as the lesser of two evils" and added:

"My God and my Bible have not taught me to stop fighting for justice in the face of adversity."

And he said, "If I had to serve four years in Georgia, I'd rather serve it under Lester Maddox than under Bo Callaway."

Mr. Williams said, "I want you to understand I'm not campaigning for Lester Maddox" but "Bo Callaway is against everything we stand for."

He cited Mr. Callaway's record of voting against such things as federal aid to education, the minimum wage and Medicare.

THE chairman of the write-in movement said earlier that a political poll shows there are more undecided voters than there are voters committed to either of the two regular candidates.

William K. Barrett of Augusta said that the latest Quayle poll showed about 33 per cent of Georgians polled leaning toward each of the two regular candidates, while some 34 per cent "didn't want either one of them.

"Our job is to galvanize that particular force (undecided voters) . . . and march it to the poll on Nov. 8, and I think we're going to do it," Mr. Barrett said.

Mrs. Bolton Lunceford of Atlanta, chairman of the women's division of the movement, told the delegates that "On Nov. 9 you can say to yourself 'With one vote, answerable to one conscience . . . I did what was right.'"

The primary purpose of the workshop was to instruct delegates how correctly to write-in Mr. Arnall's name on the election ballot so they could teach others.

State Sen. Leroy Johnson of Atlanta announced during the workshop that the Macon Voters' League had just voted 95 to 27 to support the write-in movement for Mr. Arnall.

Charles Morgan of the Atlanta office of the American Civil Liberties Union instructed them to write in the proper space either, "Ellis Arnall for governor," or "for governor, Ellis Arnall."

He said the names must be manually written in since a federal district court in Atlanta Friday ruled that stickers could not be used because Georgia law forbids it.

ATLANTA JOURNAL-CONSTITUTION
SUNDAY OCT, 30. 1966

'TRICK OR TREAT?'

Georgia Politics

by CHARLES POU

Fame Fleets and Tempus Fugits As Snow-Famed Morris Knows

Was trying to think up some way not to write about the write-in scam for Sunday when somebody told something new about Aubrey Morris. It sure reminded, too, how fame fleets and tempus fugits.

Only a few months ago Aubrey was taken off regular 22 and 23 hours a day news reporting for WSB radio and promoted to news director. Mighty deserved promotion, too.

But one day last week a lady called WSB and asked to speak to Aubrey.

"Aubrey who?" asked the switchboard operator.

Which goes to show, and it also brought the thought that winter is coming, maybe a snow or so, and a snow just won't seem a snow without Aubrey reporting on it.

You talk, or anyway they talk, about The Atlanta Journal covering Dixie like the dew — well, no one covers a snow like Mr. Morris.

He'd get hold of 'em early in the morning while you were driving to work and you would get this great excited, adventurous feeling, like you were maybe mushing across Upper Slobbovia, and by the time you hit the 10th Street section darned if you wouldn't look back to see if a pack of wolves was stalking you.

Late afternoon Aubrey would wind up with interviews with kids playing in Piedmont Park. And those kids had better be having a good time and sounding happy. "Kids," he'd say.

Gosh, if this sounds like we are having fun with Aubrey we really don't mean it that way. He's one of the most aggressive, hard-working, unawed radio people in the business, and, bar none, absolutely the best at getting politicians to say something whether they want to or not.

Any how, we found no way not to write about the Ellis Arnall write-in thing, and, except to do what we promised an angry little lady we would do. We'll just pass some new comments on the situation along to you without comment at all from us.

This little lady said she didn't like that "Morons for Maddox" tag somebody had put on the Arnall Write-in movement and would we, out of fairness, next time we used it refer to us and others against the thing as "Cads for Callaway." We won't but any how, here are some new statements:

NOW STEP forward Peyton Hawes of Elberton, a man with a long and distinguished legislative career and the choice of a lot of people—but not enough of them—as candidate for lieutenant governor in 1962. He says in a statement:

"In the lieutenant governor's race in 1962, I had the honor, just like Jimmy Carter, of apparently being in the runnoff until the early morning hours, when I lost out to Lester Maddox and Peter Zack Geer. The voters apparently were not satisfied then with the choice between the two and a group of concerned citizens, the next day, tried to persuade me they should launch a movement for a write-in campaign on my behalf.

"I told them then, and I still maintain, that a political race is very much like a baseball game . . . 'some you win, some you lose, and some are rained out. I played by rules and I lost by the rules, and as far as I was concerned the ball game was over.'

"Everyone knows what a write-in will do in the present race. I feel it is incumbent upon Ellis Arnall to discourage this write-in movement. If he does, it will die of its own momentum."

NEXT, Atlanta Alderman G. Everett Millican, one of the all-time greats in the legislative business, sometimes contentious, but always in there watching every bill. Right about most things. Said he:

"My love for the state of Georgia is such that I just don't under any circumstance want to see it go backward. It is inconceivable to me for anyone to be elected governor of this great state that has never had one single day's experience in governmental affairs, the case with Mr. Maddox.

"I am positive the two top men will be Mr. Callaway and Mr. Maddox. So the runoff selection (by the Georgia General Assembly) will be between them. But, having served under six governors and in six legislatures, I can state positively that, under no circumstances, never would a Georgia legislature select Mr. Arnall . . ."

FINALLY, a letter writer:

"Dear Mr. Pou:

"I am a fuzzy-minded liberal. I brighten at words like 'rationale' and 'simplistic' and I do not draw up white-knuckled at the sight of beatniks or picket lines. I do not feel threatened by a jobless man getting $37 a week and I conceive Martin Luther King to be a good creative force. School guidelines—and most other federal action that is decried as part of a sinister takeover by an all-powerful centralized government—I see as simple and deliberate effort to dislodge deep-seated discrimination against American citizens.

"Therefore, I am against Maddox and hardly thrilled over Bo.

"But I am against the Ellis Arnall write-in.

"The many weakness in the write-in idea will keep it from drawing a really representative number of moderates and liberals. But the danger is that politicians may consider this small number of voters as the full force of liberal and moderate opinion in Georgia. In future races office seekers could be tempted to ignore 'this write-in crowd' and only go after the conservative vote.

"It is thus my hope that the write-in will be so insignificant that politicians in years to come will give respectful attention to the moderate and liberal vote that was hidden in the Callaway victory margin.

"Is this rationale too simplistic?

Yours truly,
Kneejerk."

LISTEN AND PONDER ATL. JOURNAL OCT. 31, 1966

When Lester Maddox Spoke More Freely

By REESE CLEGHORN

LESTER MADDOX has had very little to say about his racial views during the governor's race. When questioned about them, he even threatened to walk out on one audience.

But he says emphatically he has never changed his position on racial matters and never will. So what he said in a long talk which I recorded with him in 1963, a year when he was talking more freely, may be worth noting now.

He said then he believed segregation was ordained by God, that Negroes' proper home is in Africa, that Negroes are inherently inferior, and that through the civil rights movement the United States has reached a point at which a complete Communist takeover is imminent.

That is a kind of logic that has the most dangerous implications, of course. It goes beyond mere ignorance, and it potentially justifies conduct that otherwise would be unthinkable.

Listen and ponder.

". . . God set up the boundaries of the habitations of people, by continent, and I think that our trouble today has been brought about by integration," he said.

". . . In Africa, the black people are suited for that area, and having been brought into the United States, into our country, a country that's more suitable to the white civilization, I think that we have hurt their opportunities."

* * *

THE CLIMATE MADE a difference? he was asked. "I think that in God's setting up the people the way he did—the people of Asia, the people of northern Europe, the people of Africa—and established the bounds of their habitation, I think that we have gone against God's will in moving the people from these areas and to force them into other races."

What about equality of opportunity?

"Well," he said, "I'm sure that history speaks for itself. We've never had an integrated society anywhere that was as successful as a segregated society, in any country any time during history."

Negroes are inherently inferior intellectually, he said.

"Africa has proved their capacity. The white man hasn't interfered with them there. And they have more resources, they had all the opportunities, and the only areas where they've ever developed is where the white man has moved in and guided, given the leadership.

* * *

"THE SAME IS TRUE in Brazil. Look at Brazil. It's much larger, it has more material wealth—terrific—and it hasn't really gone anywhere at all except in those areas where the United States has stepped in to provide financial aid." This was because of integration? "Yes."

He said he thought Communists were a great influence on the rights movement and would take over the country before two more presidential elections unless the people awakened. But it was not the Communists who appeared to be the principal villains in his mind.

"I think the major cause behind the move to integrate is not to help the Negro," he said. "It is to help the big financial people.

"Maybe the Carnegies and the Mellons and the Fords and the various big-money people—they want to please the African countries in order to get into the market where there would be almost a virgin market for heavy industry, for appliances for homes, for furnishings, for clothing, and in order to do that they're trying to indicate to Africa and other parts of the world that the United States has come to be a leader for doing something for the Negro. . . ."

* * *

WHITE PEOPLE MUST fight all this, he said. "We are careful enough to protect our pets, our birds, our dogs, our livestock, our cattle—the purity of them—but we are foolish enough to not take the same precautions to protect our own people.

"I think it's ungodly, I think it's sinful, and I think it's inhuman, and I think it's cruel that we would subject our people to integration and racial amalgamation. . . . It would be immoral to bring one group of people up to integrate them into a society that would bring another group of people down, and bring down a country."

Would integration bring down a country? "Well," he said, "it has everywhere in history, hasn't it? It has in Italy, it has in Brazil. . . . Yes, sir."

Communists want integration in the United States for that reason, he said.

* * *

"WE SEE A LOT OF American business people placing special emphasis on what they are doing for the Negro. . . . I think we are going to wind up in this country with some business firms manufacturing and selling to whites and some to Negroes. And it's going to be more segregated in a few years than we have ever had before."

What about the Ku Klux Klan? he was asked, since it has enthusiastically supported him in the past and he has not disavowed it.

"Well," he said, "I'm not familiar too much with the Klan and I don't know what their organization is today and what they are in size and number."

Did he have any doubts about what it is?

"Well, it's supposed to be a segregationist movement and back in the earlier part of this century most of our governors and public officials and mayors and doctors and bankers and business people were all members of the Klan."

ATLANTA JOURNAL, Nov. 1, 1966

The Atlanta Journal

"Covers Dixie Like the Dew"

Since 1883

Jack Tarver, President • Jack Spalding, Editor

Callaway Is the Logical Choice

ON NOVEMBER 8 Georgians once more will indicate a choice for the governorship.

The Democratic party offers Lester Maddox.

The Republican party offers Bo Callaway.

There also is a write-in movement for those unhappy with the offerings of the two political parties, and who feel no obligation to abide by the rules which produced these candidates.

This vote next Tuesday will help set the tone of state government and help determine the way the state will move during the next four years.

We have been very fortunate the last eight years, during the terms of Ernest Vandiver and Carl Sanders. These two men gave us sound government and used restraint and moderation in their approach to the vexing problems of the day.

The result was a period of stability and relative peace. Under these conditions the state was able to make great progress in adding to its economic strength and increasing the quality of education.

These two governors were able to command the services of some of the most able people in Georgia to help with state problems.

In addition, both were experienced and astute enough to keep an eye on all departments, and this was a great encouragement to the cause of honesty in government.

During the last eight years we have seen great advances in the University System and in the common schools. We have seen such things as the reports of the Bowdoin Commission, a blueprint for Georgia progress.

We have seen the beginnings of reform in nearly all branches of the government including the highway department, the penal system and the State Hospital at Milledgeville.

Do you want to continue progress? To build up our schools? Continue to encourage prosperity through honest, intelligent government?

We believe most Georgians do.

To continue this progress it becomes necessary to choose the candidate most likely to follow in the paths of his predecessors.

We believe that Mr. Callaway, bull-headed and overly conservative though he may be, is the better equipped by nature and training to keep Georgia on this even and prospering course.

His background, his work in Congress, his obvious desire to serve, the resources which are his to call upon, indicate a sound future under his administration.

If he is elected, he will be sworn in owing less to fewer people than any governor in recent history.

He will be his own man.

The Journal has been interested in the development of a two-party system in Georgia for a number of years. It is good to increase the number of candidates and to break the hammer lock the old oligarchs have had on state patronage and the state treasury for so long.

The candidacy of Mr. Callaway is one of the beneficial results of this system.

We endorse him therefore, not only as the better prospect of the two candidates, but as the representative of a new system which should do a lot to improve the caliber of local and state politics.

ATL. JOURNAL NOV. 1, 1966 PAGE 1.

Maddox Predicts 50,000 Write-Ins

By WILLIAM O. SMITH
Atlanta Journal Staff Writer

STATESBORO, Ga., Nov. 1—Lester Maddox said here Tuesday that the write-in campaign for Ellis Arnall "won't work" and he predicted it will net no more than 40 to 50 thousand votes.

He called leaders of the write-in effort "soreheads," and then he said, "They couldn't get in the front door and now they are trying to slip in the back door like a thief in the night, but it won't work."

MR. MADDOX appeared to be evidencing more and more concern over the Arnall write-in effort. He commented on this at some length Monday during an appearance before members of the Atlanta Press Club.

There, he revealed that he had been in touch with Arnall people in an effort to "get this thing eliminated." And he said he felt he would benefit more than his Republican opponent, Howard (Bo) Callaway, if the write-in movement were stopped.

Mr. Maddox, in a swing through South Georgia, where he reportedly is strongest among voters, spoke at a breakfast meeting here Tuesday morning. Later he was to visit Savannah and Brunswick.

HE TOLD the breakfast meeting that his opponent is "calling on the whole power structure of the national Republican Party to help him get elected."

He said the Republicans are "spending $500,000 a week" on Mr. Callaway's campaign but that "the people will say the office is not for sale on Nov. 8."

Addressing a wildly enthusiastic crowd at Dublin Monday night, Mr. Maddox said his opponent is "reaching for the governor's office like a child reaching for a toy" and really has his sights set on the Senate or the vice presidency.

MR. CALLAWAY doesn't know whether he's "a Democrat or a Republican . . . or a segregationist or integrationist . . . or whether he wants to run for Congress, the Senate or governor," Mr. Maddox charged.

"If he doesn't know where he stands, how does he expect the people to find out?" he asked.

Newsmen covering Mr. Maddox generally agreed that the crowd overflowing the Agriculture Building in Dublin was the noisiest and most enthusiastic of the campaign.

Estimates of the crowd—which came from a 10-county area—exceeded 2,000, and most observers agreed it was a larger turnout than Mr. Callaway's crowd in the same building on Saturday night.

Although the crowd had evangelical fervor for Mr. Maddox, they weren't too pleased with the press, and constantly heckled newsmen as speaker after speaker denounced newsmen.

"You can't believe the newspapers," one man cried out loudly to raucous laughter. Another cried, "Write that down" when Mr. Maddox made a crowd-pleasing point.

THE CROWD applauded almost every statement Mr. Maddox made and persons constantly yelled out to him, "Tell 'em, Lester!" and "Go, Lester!"

Mr. Maddox said his opponent has been trying to find "Maddox Country" but that he'll be able to see it on Nov. 8.

Apparently getting more confident, Mr. Maddox said he expects 1,000,000 votes on Nov. 8 if the weather is good. He predicted he will get from 600,000 to 675,000 of them.

Mr. Maddox charged his opponent is "running against the people" and labeled Mr. Callaway the "geatest drop-out of all time."

HE SAID Mr. Callaway "dropped out" of the Board of Regents, broke his promises and pledges and laughed at the people, and has been in, out, in the governor's race.

"He's dropped out of Congress now," he said.

Mr. Maddox said Mr. Callaway's "greatest drop-out will be Nov. 8" and said that after he is inaugurated in January, "he (Mr. Callaway) can drop in and visit me in the governor's office."

BEFORE HE SPOKE to the Dublin group, Mr. Maddox was presented with a check for $500 to help pay his campaign expenses. He quipped that he needed money and campaigned "four months before he got $1,000 in contributions," but then he asked permission to endorse the check to the Gracewood school for the mentally retarded.

In his speech, he promised to increase the state's mental health budget at least 50 per cent during his administration and launch a program to provide a mental health treatment center in every congressional district.

ATL. JOURNAL Nov. 2, 1966

'AFTER ALL, HE WAS KNOWN FOR HIS AX HANDLES, TOO!

Callaway Conceals Racism, NAACP's Williams Charges

By SHARON BROWN

A Negro leader here has charged that Howard (Bo) Callaway is practicing "concealed racism," and said he thinks he'd rather have a person who is "open about it."

Rev. Samuel Williams, head of the NAACP here, said:

"I asked Mr. Callaway the other day if he is going to desegregate Georgia and he didn't even have the courage to say it in the enclosure of his office."

The Rev. Mr. Williams was one of four men who engaged in a spirited panel discussion at the YWCA here Tuesday on the race for governor between Republican congressman Callaway and Atlanta segregationist, Lester Maddox.

Jarvin Levinson, representing Mr. Callaway, charged that Mr. Williams was equating Mr. Callaway's voted in Congress with racism and segregation, and "they're not in the same class at all."

(Mr. Callaway, in his first term as congressman, has voted against civil rights legislation, raising the minimum wage, federal aid to education and federal aid to cities.)

"Do his votes in Congress make him a racist?" Mr. Levinson, an Atlanta attorney, asked. "I think he can vote that way without being a disguised racist."

ALSO ON the segregation issue, Will Wallace declared that his candidate, Mr. Maddox, has promised more to Negroes in Georgia than any other candidate.

Mr. Maddox, he said, has told Negroes they are welcome to "come in his office and discuss things," and that he will appoint them to responsible positions in state government.

"I will challenge Bo Callaway to make those statements," Mr. Wallace said. "Lester Maddox has made more statements like that than any other candidate."

THE FOURTH MAN on the panel, labor attorney Joe Jacobs, made a strong pitch in behalf of the write-in movement for former governor Ellis Arnall.

Mr. Jacobs declared there are "not two candidates in this race, but three." He urged his listeners, members of Active Voters and the Public Affairs committee of the YWCA, to "vote their consciences and convictions."

"What is our choice today?" he said. "We're asked to vote for the lesser of two evils.

"One man says 'I'm going to use ax handles and a gun, and the other runs back to Washington and votes against the minimum wage bill, federal aid and money-spending federal programs."

The Rev. Mr. Williams said he and "four or five" other Negro leaders had approached Mr. Callaway last week on the integration issue.

He said he "wasn't impressed" with Mr. Callaway before the visit, and was even less impressed with him when he left his office.

"If someone is going to be a segregationist, I think I'd rather have a person who is open about it," the Rev. Mr. Williams said. "I think you should have a certain amount of honesty, even in your dishonesty."

The Rev. Mr. Williams declared also the time has come for Georgia voters to put their moral convictions before either party loyalty or the platform of the candidates.

IN REBUTTAL, Mr. Levinson said when Lyndon Johnson was running for vice president in 1960, with his segregationist background, no one considered the "moral commitment" then.

He said further, if the nominee on the Democratic ticket today were anyone else but Mr. Maddox, no one would be interested in a write-in movement.

"This is basically because anybody who has taken to the streets and defied the law as Lester Maddox has done does not deserve to be the nominee of the Democratic party, or any other party," he said.

Mr. Levinson said, although he is a personal friend of Mr. Arnall, he wonders if Mr. Arnall is fulfilling his "moral commitment" in allowing the write-in movement on his part to continue.

On behalf of the write-in, Mr. Jacobs predicted it may not be the Georgia Legislature that elects the governor in the event that one candidate does not get a majority.

He said, under the new election laws, there could be a runoff election Nov. 22, or "the people may elect the governor under a court order."

Mr. Wallace, who was an aide in George T. Smith's successful campaign for lieutenant governor, said Mr. Maddox won the nomination spending "less than $35,000," and no professional politicians working for him."

"When a man like that beats a more well-financed and more articulate man, you have to look at what this means," he said.

Mr. Wallace said the state of Georgia has never had a governor who was not a segregationist, including Gov. Sanders.

ATL. JOURNAL NOV. 3, 1966

Bo Callaway Is the Only Choice

Macon News

THE RESULT OF the Democratic primary runoff of Sept. 28, in which Lester Maddox defeated Ellis Arnall, left Georgia with two rigid conservatives contesting for the governorship. And put us on the spot.

We've been squirming ever since, hoping Mr. Maddox would show some sign of responsibility or Mr. Callaway would give some evidence of flexibility. . . .

* * *

WHEN MR. MADDOX won the nomination of the Democrats, we were left with a choice of: (a) going fishing; (b) encouraging a write - in campaign for Arnall; (c) recommending Maddox; (d) supporting Howard H. "Bo" Callaway, the Republican candidate.

Why go fishing? It is up to the voters to elect the next governor and, despite disagreement with some views of either the Democratic nominee or the Republican nominee, there is a difference between them, and thus a choice to be made.

To go fishing would in itself be irresponsible in that the serious business of selecting the next governor would be turned over to others.

The write-in campaign for Arnall or anyone else is a futile gesture. . . .

* * *

OVER THE YEARS we have supported the Democratic party because we thought it the party with the best program and the best candidates for all of the people.

That is not so when it comes to the Democratic gubernatorial nominee in 1966. Lester Maddox is an irresponsible publicity hound who is not equipped emotionally or intellectually to be governor.

He has successfully gained the sympathy of many as a small businessman who stood up alone against a ruthless Uncle Sam, with nobody "except God and the people" with him.

The truth is that Maddox received a good price for his restaurant, and parlayed the chasing of Negroes while waving a pistol, with Georgia opposition to desegregation, into the Democratic nomination.

Maddox is no longer alone. He has been joined by Roy Harris, Marvin Griffin, James Gray and other county unit system die-hards, as well as an army of state job-holders who want to hang on to their offices.

He has encouraged those who play footsie with the Klan or the Birchers to enter his ranks. These people may very well make a shambles of state government without Maddox even being aware of it.

* * *

THERE IS ONLY one choice for us, or for any conscientious Georgian who has thoughtfully analyzed the election situation. And that choice is "Bo" Callaway.

Mr. Callaway has experience in government as a congressman and as a member of the University System Board of Regents.

He may not have always voted the way we would have liked, but he is a responsible individual.

One can no more imagine Callaway handing out ax-handles or chasing a Negro with a pistol than one can imagine the quick-triggered Maddox working with the federal government to solve Georgia's problems, or impressing industriailsts that our state is a progressive place in which to locate new industry.

"Bo" Callaway would preserve the dignity of Georgia and uphold the sanctity of the law. We cannot say the same for Lester Maddox

* * *

THE GOP candidate has not stooped to demagogism in an effort to out-shout Maddox. He has not made reckless promises, such as the Democratic nominee has handed out liberally.

He has made charges only when he could back them up, in contrast to the scatter-gun unsubstantiated accusations voiced by Maddox.

He has attempted to debate the issues calmly and logically, but has been thwarted by the inability of Maddox to sit still and answer a question or document a statement.

There is only one choice in this contest. The News earnestly recommends the election of "Bo" Callaway as governor of Georgia.

ATL. JOURNAL NOV. 3, 1966

LETTERS TO THE EDITORS:

Write-Ins Endanger Future of Georgia

The Editors: If the times were not so demanding and the decision not so vital insofar as the continued development of the state is concerned, there would be a lot of comedy in the actions of the confused "liberals."

In past elections we have seen them pervert the meanings of both conservatism and liberalism. This year, in two primaries, they have had a chance to expound their beliefs, and their candidate(s) for governor lost.

Now they are willing to jeopardize the political life of Georgia because they are no longer in the election game. They show their political naivete by climbing into the political bed with the very element they profess to abhor. This is the meaning of their misguided effort to promote a "write-in" campaign.

Only by voting for one of the regular candidates can one cast a significant ballot in this election.

The meaningful decision one has to make is whether to vote for the candidate who will approach each problem with an intelligent attitude or for the candidate who will do so in a demagogic spirit.

JOHN J. PERSHING.
Carrollton.

BOTTOMED OUT? ATL. JOURNAL - CONSTITUTION SUNDAY, NOV. 4, 1966

Lost at Sea and the Beacons Are Dark

By JACK SPALDING

THIS IS the year the markers came down and the guideposts went. Democrats are voting Republican and Republicans are voting Democratic. There is another group, just writing in.

There is another group, most interesting of all, which finds the current condition of the state Democratic party not without virtue. This group preaches that four years of government under the new leadership is just what Georgia needs.

* * *

FROM IT we will emerge purged clean of hate and frustrations.

This is all right if you are a flagellante by nature, or can stand four years of purging. It also is all right if you're unencumbered and can leave for four years, returning when the purge is over.

But most would like to keep living normal lives or are sentimentally attached to the place or can't afford to leave.

So it's vote for this one or that one, or throw yourself down a well, depending on your nature and hope that somebody way out there cares enough to watch out for us. Remember, the average politician is a lot more interested in his own advancement than in yours or mine.

It is an interesting year, regardless of the fact that the evil in men's souls is more apparent than usual.

* * *

THIS CERTAINLY is the year that should see the end of the old Democratic party (as we know it). Granted some major victories at the polls and the arrival of common sense at headquarters this also may be the year the Republican party comes to life as a positive force in Georgia politics.

As for the Democrats, we don't have a real party of that name here. This party has been whoever was governor at the time, plus his friends. It has been feudalistic, oligarchial, and its connection with the national party of the same name often has been hard to figure. Its death is overdue.

The Democratic primary this year saw leadership of that group pass into the hands of Lester Maddox and friends. Whether the new Maddox party will be present at the Democratic national convention in 1968 is a matter for speculation.

Jack Spalding is editor of The Atlanta Journal.

The future of the Republican party is a matter for speculation also. On the national level the most obvious Republican political drive is the instinct for suicide. We have seen indications of that on the local level as well.

* * *

RIGHT NOW THE experts tell us the election can go either way. Certainly each party has within itself the power to defeat itself through clumsiness, or by failing to grasp some clearly offered political advantage.

It is a year of bewilderment for those accustomed to the old patterns and cliches.

A national Democrat, for instance, isn't going to find the current leadership of the local group of the same name very congenial.

A national Republican might find enough of the national cliches in use here to feel at home. But his group doesn't have a chance unless a lot of pragmatic Democrats cross over.

* * *

NO MATTER who ends up with the governorship, no good party man will get solid satisfaction from it.

The party lines are blurred, the old Democratic party is in pieces and the Republican party is yet to be put together.

Next week may be catharsis week in Georgia. From the final confusion may come two organized political parties like other places have.

NOV. 4, 1966 PAGE ONE ATL. JOURNAL

PINEY WOODS PETE Says:

DEAR MISTER EDITOR:

Congressman Charles Weltner, who gave up the Democratic nomination to succeed himself because he couldn't support Lester in the general election, tried to tell a meeting of Fulton County Young Democrats that a write-in for Arnall Nov. 8 would be futile. "We've already lost the governorship," he asserted. And that was that.

But he made another statement that is open to question. He was quoted as saying that "we can win in 1970 for governor."

If Lester wins by a sizable majority next Tuesday, and the succession law remains, what assurance would we have that he would not run Mrs. Maddox when he goes out? He admires the ways of the Wallaces of Alabama.

Yours truly,
PINEY WOODS PETE.

ATL. JOURNAL - CONSTITUTION SUNDAY NOV. 6, 1966

Write-Ins

Macon News

IT TAKES more time than is available to organize . . . a write-in drive. It requires more energy than advocates can apparently muster. And it is necessary to have a strong force behind it. So far, no moderates who can bring such a project alive have endorsed it, and no major daily newspaper in Georgia has proclaimed it a good idea.

Might as well give up, fellows. If you want to see Mr. Maddox elected governor, going fishing on election day or encouraging a write-in campaign makes sense. Otherwise, forget it.

Georgia Politics

by CHARLES POU

Little Writing-In Foreseen Among Rural Negro Voters

The Ellis Arnall write-in movement likely will get a fairly heavy vote from Negroes in Atlanta. That is, from those who successfully make the effort to write in the name of the former governor and have their votes counted. Actually, it is the opinion here, the effect will be the same—count' em or don't count 'em, Lester Maddox benefits.

In rural areas of the state, however, it is believed the formal write-in vote by Negroes will be minute. A South Georgia citizen, once actively interested in politics and still an interested observer, tells why.

"Down here," he said, "the Negroes are having no part of the write-in campaign because they are frightened by the possible outcome of this election. In Atlanta, Negroes have police protection. South Georgia Negroes are fearful that the election of Mr. Maddox may be interpreted as a license for the lower elements to take over."

The Democratic nominee has asserted repeatedly there will be law and order during his administration if he wins, and that he will run his own show. He says there will be justice for all.

Nevertheless there is fear, out where things can get sticky in a hurry and the unraveling of who done it may take years, if ever, once federal investigators move in.

It is certainly the hope here such fear is unjustified, if Mr. Maddox is the winner. But it is there, out in the boondocks, where petulance, vindictiveness, bitterness, attitude of a curse-upon-both-your-houses, thoughts of sweet revenge, and just plain stupidity cannot always be indulged in cozy surroundings.

Fear of the midnight rap on the door. . . . Nightriders. . . . The mean whine of a bullet.

NOW COMMENT of a legislator from a small county: "My county is going for Maddox, and if this thing goes to the legislature, don't let anybody kid anybody about it—I am going to have to vote for Maddox. And it will be the county unit system all over again—and he'll win."

Those are no-name comments, because both men live in small counties. There are plenty who have spoken for the record, and some of the things they have said will be summarized once more. The writer also would like to make it plain again that his own objection is not to the idea of write-in—but to the formal, born-to-lose (it is believed here) effort in behalf of loser Ellis Arnall.

REP. CHARLES WELTNER, a young man of style and class who has already expressed his objection to Mr. Maddox in dramatic fashion, spoke on the write-in subject this week. He told a packed audience of "Write-in Georgia" backers he considers the effort a lost cause. Mr. Weltner said he intends to write in a candidate for governor, maybe "my father," but added he was against devoting time and money to the organized movement.

To some present who wore "Arnall Write-In" buttons, who later wondered if they had heard him right, he was more specific.

"We've lost the governor's race," he told three ladies. "I don't believe in lost causes. . . ."

One in the group continued to argue, and he said with a grin, "I'll tell you, the Ku Klux Klan gives me less trouble than you-all."

JESSE HILL, a veteran worker in the Atlanta Negro movement here, eminently successful at increasing Negro registration, has said:

"I don't see how anybody could join in something to drain off Negro votes. . . . Many of those calling the shots in the Write-in Movement are middle class Negroes with high incomes. They are safe. We have a good police department, a good police chief. But in the little hamlets the election of Maddox by some could be taken in a peculiar way. . . ."

Mr. Hill has argued violently with some of the other leaders in the Negro community about the issue. He has since declared his support for Callaway, calling it "facing up to a nasty political problem."

A news story by Hank Johnson, reporter for The Red and Black, asserts in the current issue of the student newspaper at the University of Georgia:

"Dr. Brett Hawkins of the political science department warned voters that a write-in campaign would elect Lester Maddox governor and, in the process, smother the fledgling state Republican party. . . .

". . .Hawkins said that the candidates differ in education, their views on supporting federal laws and experience in governmental affairs. . . .

Peyton Hawes of Elbotton, a close loser in the 1962 race for lieutenant governor and urged by some to become a "write-in" candidate: "I told them a political race is very much like a baseball game . . . 'Some you win, some you lose, and some are rained out. I played by the rules and I lost by the rules.'"

A "fuzzy-minded" liberal, "against Maddox and hardly thrilled over Bo," but opposed to the Ellis Arnall write-in campaign: "The many weakness in the write-in idea will keep it from drawing a really representative number of moderates and liberals. But the danger is that politicians may consider this small number of voters as the full force of liberal and moderate opinion in Georgia. . . ."

AN ATLANTA RABBI two weeks ago endorsed the write-in movement. Now he is urging members of his congregation to leave it alone.

Still, the idea for the write-in campaign has its appeal, and the guess here is a fairly high vote will be produced by it — possibly enough to put the election of Georgia's next governor up to the Georgia legislature.

Mr. Maddox remains strong in the small counties, although a final prediction will be that Mr. Callaway will win in a close contest.

The backlash and Ellis Arnall backbite factors continue, but there are those who think they see slight gains for Callaway, even in the rural counties, as citizens come up to the reckoning day.

"There's still a lot to be made about," said one small county voter about the situation. "It will be a fine thing if we could elect Lester for something like six weeks--to show LBJ, to show the rioters, to show the newspapers. . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant,*

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees.*

Appeal from the United States District Court for the Northern District of Georgia Atlanta Division

REPLY BRIEF ON BEHALF OF APPELLEES, JUSTICE, et al.

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---

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ARGUMENT

In his brief, the appellant does not dispute the fact, found by the District Court, that Georgia has placed the election of her Governor on a popular basis. Indeed, he could hardly do otherwise since every Governor since 1824 has been elected by the people of Georgia. The main thrust of appellant's argument is

directed to the proposition that the decision of this Court in *Gray* v. *Sanders* "does not require all State officers to be elected by popular vote" (Brief of Appellant, p. 12) and that, therefore, when no clear majority is received by any candidate in the general election, the State is then free to abandon the popular vote method of selection of its Chief Executive and to place the final power of selection in the General Assembly, today malapportioned and having 88.4 per cent of its members pledged to vote for the gubernatorial nominee of their party.

But the question is not, as appellant would seem to suggest, whether Georgia can adopt some method, other than a vote of the people, to select her Chief Executive.[1] The question is rather whether Georgia, having chosen to place all other stages of the general election

[1] Nor is the question whether a state requiring only a plurality for election might provide for selection of its governor by the legislature in the extremely unlikely event of a tie vote. In case of a tie there would be no clear expression of the popular will of the type sufficient to elect the chief executive in such states. Thus, such an election would not present the possibility that the choice made by the greater number of citizens in the general election might be disregarded by the legislature; nor would such an election necessarily involve selection by a legislature which is malapportioned to the degree present in the Georgia General Assembly. The question is highly theoretical since a tie vote in a statewide race for a major office would seem to be practically impossible. If, however, this did occur and we faced, in a state like Illinois (Brief of Appellant, App. D), a situation where among several candidates receiving substantial blocks of votes the two highest were tied, reference of the final selection to the legislature without giving to those who had voted for the minority candidates an opportunity to express a choice between the two highest candidates would certainly be disturbing to many people, and we would not presume here to venture an opinion on the constitutionality of such a reference. In any event this theoretical question is not involved in the present case.

of its Governor on a popular basis, can disregard the will of the people in the final stage of the election and place the selection of the Governor in the General Assembly, in the name of and for the sole purpose of assuring majority rule, which it does not do.

An argument, similar to that made by the State here, was rejected by this Court in the *County Unit* case. Thus, in *Gray* v. *Sanders,* 372 U.S. 368 (1963), it was argued that since the State was not required to nominate candidates for Governor by means of primary elections, but could, and did in fact, permit nominations to be made by party conventions in which the people had no right to equal participation or representation, the Equal Protection Clause could not be violated by the failure to provide equal participation in primary elections. This argument was summarily rejected by this Court, which held that the mere fact that Georgia might authorize the nomination of candidates by other means not involving a vote of the people did not justify discrimination between voters if the State chose to conduct a popular primary. As this Court emphasized:

> But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in Gomillion v. Lightfoot, supra . . .:
>
> > "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 372 U.S. at 381.

Whether or not the State might have chosen some other means to select her Governor, it is clear beyond

doubt that Georgia has chosen to fill this vital position by means of an election, in which all qualified citizens of the State are equally entitled to participate. Under these facts there is "no constitutional way by which equality of voting power may be evaded." The clear mandate of the Equal Protection Clause forbids the State from employing at any stage of the election process any means which could weigh the votes of some citizens more heavily than those of others, totally disregard the popular vote, or give, directly or indirectly, to any citizen or group of citizens a greater voice in the selection of their Chief Executive than that given to all other citizens of this State. The provision of the Georgia Constitution which was invalidated by the District Court is the last vestige of the county unit system in this State and the job begun in *Gray* v. *Sanders* will be completed when it has been stricken.

Whatever the extent of disagreement as to the scope of the requirements of the Equal Protection Clause in other cases, the Equal Protection Clause certainly demands at a minimum that such a plan as adopted by Georgia for the selection of its Chief Executive must not permit the systematic frustration of the electorate.[2] For this reason, the provision of the Georgia Constitution sanctioning this result was properly held invalid.

To bolster its argument on constitutionality, the appellant urges in effect that affirmance of the District Court's judgment would leave the State without

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[2] The selection of a state legislature or, appellees submit, its chief executive "*must be such as not to permit the systematic frustration of the will of a majority of the electorate* of the State." *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 337 U.S. 713, 744, 753-54 (1964) (dissenting opinion of Stewart, J.). (Emphasis supplied.)

any effective means of selecting its Chief Executive. This kind of an effort to alarm the Court and deter it from addressing itself to basic constitutional issues involved in State procedures is not an unfamiliar one. *Reynolds* v. *Sims,* 377 U.S. 533, 566 (1964); *Baker* v. *Carr,* 369 U.S. 186, 251, 261-62 (1962) (concurring opinion of Clark, J.). The complete answer to appellant's concern lies in the perfectly clear, all-inclusive provisions of Section 34-1514 providing for a prompt runoff. Appellant argues weakly that this section is not applicable and that, even if it is applicable, the "mechanical complexities" are too great to overcome.[3]

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[3] The appellant asserts that a runoff pursuant to Section 34-1514 of the Election Code would be impossible because the 14-day period prescribed in this Section is "not enough time" within which to hold such a runoff and because one set of the returns in the gubernatorial election remains sealed for transmission to the General Assembly. Ga. Code Ann. § 34-1506(c). Although the requirement that a runoff be held within 14 days was sufficient for the Democratic primary runoff held on September 28 in which more than 800,000 people voted, (R. 141-42, 179), the General Assembly, anticipating the probability of delays in statewide runoff races for Governor, United States Senator, and other public offices as well as in local runoffs, added the words "unless such runoff date is postponed by Court order." Ga. Code Ann. § 34-1514. The District Court has retained jurisdiction "to enter such other and further orders as may be required" (R. 234), and can postpone (*i.e.* put after) the runoff date. The fact that one set of the gubernatorial returns is sealed constitutes no obstacle to a runoff since certified copies of such returns are maintained as public records in the office of each ordinary. Ga. Code Ann. §§ 34-1506(a), 34-403. This information is, therefore, readily accessible to the Secretary of State, who has the duty of advising the ordinaries of what to put on the ballot in *all* statewide runoffs (Ga. Code Ann. § 34-301; *cf.* § 34-401 on coordinate responsibilities of ordinaries), *i.e.*, the names of the two persons "eligible to compete with each other in a runoff primary or election" (Ga. Code Ann. § 34-1704(a)) who are "the two candidates receiving the highest number of votes" (Ga. Code Ann. § 34-1514) in the general election.

His argument magnifies questions that would ordinarily present no significant problem to the Secretary of State and the Attorney General. As soon as the appellant is given the clear and final direction that the invalid provisions for reference to the legislature cannot be followed and is advised that it is his duty to follow the provisions of the Georgia Election Code regarding runoffs, this particular disturbance in Georgia's governmental life can be resolved with promptness, dignity and certainty.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 800.

BEN W. FORTSON, as Secretary of State of the State of Georgia, and His Successor in Such Office, as Such,
Appellant,

v.

JOHN MORRIS, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

APPELLANT'S REPLY BRIEF.

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BEN W. FORTSON, as Secretary of State of the State of Georgia, and His Successor in Such Office, as Such,
Appellant,

v.

JOHN MORRIS, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.

APPELLANT'S REPLY BRIEF.

This Reply Brief is in three parts:

I. Reply to those arguments which were made by both appellees Morris, *et al.* and Justice, *et al.*

II. Reply to the argument made by appellees Justice, *et al.*; and

III. Reply to the argument made by appellees Morris, *et al.*[1]

[1] Page references herein to the appellees' briefs are to the printed copies thereof.

Before turning to those matters, please permit us to correct the record. After filing Appellant's Jurisdictional Statement and Brief on the Merits, we ascertained that Rhode Island and Maine require a plurality for the election of their governors. Footnote 5 on page 14 of Appellant's Jurisdictional Statement should be changed accordingly, and the states listed in appellant's Appendix "D", sec. II, should be added to sec. III of that Appendix, thus bringing to at least 38 the number of states which provide for the election of their governors by plurality vote with the state legislatures electing the governor in the event of "tie".

I. The Georgia Constitutional Provision Whereby the General Assembly Elects, From the Top Two Candidates, a Governor When No Candidate Receives a Majority, Is Not a Denial of Equal Protection.

Appellees in both camps have attempted to reargue alleged malapportionment,[2] thereby practically conceding that the District Court's order was not properly founded.

We had thought that issue had been fully litigated and laid to rest. *Fortson v. Toombs,* 379 U. S. 621 (1965), and *Toombs v. Fortson,* 384 U. S. 210 (1966). See Appellee's Motion to Affirm with Supporting Brief in *Toombs v. Fortson, Id.,* esp. pp. 4-6, 8, and 28-30.

Appellees have attempted to extend the "one person-one vote" popular vote principle into the legislature, where the "one legislator-one vote" principle necessarily is in effect, but not on a perfectly "popular" basis. *Wesberry v. Sanders,* 376 U. S. 1 (1964). Because any vote by a legislator may be against the wishes of some or all of his constituency, few legislators are popular with all of their constituents. This is a necessary result of the republican

[2] Justice's brief, pp. 5-6, 9, 10-11 and 16-17; Morris' brief, pp. 8, 12.

form of government and the reason legislators in Georgia must run for re-election every two years.[3]

Appellees complain that, in selecting a governor, a legislator may disregard the wishes of a plurality or even a majority of his constituency. This is undoubtedly true, and intentionally so. The Georgia Constitution clearly leaves each legislator free to vote for either of the top two gubernatorial candidates. What appellees have overlooked is the fact that the election of a governor by the Georgia General Assembly, under the limited circumstances prescribed by the Georgia Constitution, is not a continuation of the popular vote process of election, but is a separate method of election which comes into operation, rarely but automatically, when the voters have not given any candidate a majority. Even if the election of a governor by the General Assembly were to be considered as a continuation of the popular election process, it is not, we submit, prohibited where provided for by the State Constitution adopted by popular vote in 1945, per-

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[3] Appellees would have the Court believe that the Democrats in the Georgia General Assembly are sworn to elect the Democratic candidate for Governor (Justice's brief, pp. 7-8, 9, and 15; Morris' brief, p. 8). Actually, the Democratic "Declaration of Candidacy" merely says: ". . . I pledge myself to abide by the Rules and Regulations of the State Democratic Executive Committee and to abide by the results of said primary election of September 14, 1966" (Tr. 150, pl. ex. C), which primary was inconclusive and has passed. It goes on to say: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia" (*Id.*). That election also has passed. No legislator is pledged to support a governor after he becomes governor, and none are pledged to elect either man governor when the General Assembly convenes in January, 1967.

Appellees have lamented the fact that there are more Democrats in the General Assembly than Republicans (Justice's brief, p. 8; Morris' brief, pp. 8, 10). Seldom, if ever, is the number of members of one political party equal to the number of members of another political party in any legislature, and such a purely political factor has never before been considered in any decision, to our knowledge, by this Court in any voting rights, apportionment, or other case.

haps with the approval of some of these appellees, before the fires of politics were ignited.[4]

II. The Quick Gubernatorial Runoff Election Sought by Appellees Justice, et al., Is Not Possible Under Valid, Existing Georgia Law.

Appellees Justice, *et al.*, have asserted that the "only obstacle" to the election of a governor in a runoff election is the provision of the Georgia Constitution here under consideration.[5] "Laws, like houses, lean on one another."[6] Having focused their attention solely on the runoff code

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[4] Appellees have argued that the General Assembly could elect not the plurality winner but the man who ran second. Out of 45 presidential elections governed by the electoral college, 14 presidents have been elected who did not obtain a majority of the popular votes cast in the election. Of those, three received fewer popular votes than their major opponents. See Appendix "E", *infra*. Georgia's constitutional provision is not comparable to the electoral college. It compares with that portion of the Twelfth Amendment which transfers the class eligible to vote to the House of Representatives. Does the *Federal* Constitution in this instance impose upon the States requirements more stringent than it does upon the United States? See *Delaware v. New York*, 35 U. S. L. Week 3138 (U. S. Oct. 17, 1966). See also discussion of *Lucas v. Colorado General Assembly*, 377 U. S. 713 (1964), in Appellant's Jurisdictional Statement and Brief on the Merits, pp. 18-19.

Appellees Justice, *et al.*, suggested in their brief (p. 13) that to permit the selection of the governor by the General Assembly would challenge the "ingenuity" of those who would challenge the "ingenuity" of those who would seek to evade the Equal Protection Clause. We submit that such a statement does discredit to those who drafted and ratified the Twelfth Amendment to the Constitution, after which Georgia's constitutional provision here under consideration was patterned in part. It was ingenious of the drafters of the Twelfth Amendment to provide a system whereby its final provision would rarely be put into operation during its 150-year history—twice in the election of a president (The House of Representatives elected Thomas Jefferson in 1800, and John Quincy Adams in 1824), and once in Georgia (This is a first for Georgia). Is Georgia to be severely criticized for ingeniously following the lead of the federal government?

[5] Justice's brief, p. 4.

[6] E. Burke, *Tracts on the Popery Laws*, Pt. i, ch. 3 (1756).

section, § 34-1514,[7] those appellees have overlooked other valid provisions of the Georgia Constitution and laws, to wit: Ga. Const. Art. V, Sec. I, Par. III (Ga. Code Ann. § 2-3003); Ga. Code Sec. 34-1506 (c), and Ga. Laws 1949, 948 (Ga. Code Ann. § 40-104.1).[8]

Appellees have argued that a runoff election can be ordered "without difficulty or further delay."[9] Georgia law provides, Ga. Code Ann. § 40-104.1 (Ga. Laws 1949, 948), that the General Assembly "shall open and publish the returns of the election for governor as provided by Article V of the Constitution of the State, and shall determine all questions relating thereto. . . ."[10] For there to be an immediate runoff, it would be necessary to order that the sealed official returns be opened and to order someone other than the General Assembly to compute the vote and determine any questions relating thereto; i. e., it would be necessary to invalidate Ga. Code Ann. § 40-104.1, among others. The transmission and publication sections of Georgia's Constitution (Ga. Const. Art. V, Sec. I, Pars. III and IV; Ga. Code Ann. §§ 2-3003, 2-3004)[11] and laws [Ga. Code § 34-1506(c)],[12] have not been declared invalid by the District Court, nor have they been attacked by the appellees. Nevertheless, these appellees would invalidate the unchallenged transmission and publication sections of Georgia's Constitution and similar sections of the Constitutions of at least 23 States. See Appendix "F", *infra*.

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[7] Justice's brief, pp. 2-3, 5, 7, 8, 9, 19, 20, 21, 23 and 25.

[8] See Appellant's Jurisdictional Statement and Brief on the Merits, pp. 9, 11, 22 and Appendix "B" thereto.

[9] Justice's brief, p. 9.

[10] See Appellant's Jurisdictional Statement and Brief on the Merits, Appendix "B".

[11] See n. 10, *supra*.

[12] See n. 10, *supra*.

Appellees Justice, *et al.*, have asked this Court to construe the runoff provision of the Georgia Election Code (§ 34-1514)[13] contrary to the construction placed upon it by Georgia's Attorney General (Tr. 142, 145-148, 179; compare Justice's brief, p. 5).[14] This would be a departure from *Bell v. Maryland*, 378 U. S. 226, 237 (1964); *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, 105 (1944); *Railroad Commission v. Pullman Co.*, 312 U. S. 496, 499 (1941); *Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959).

Moreover, counsel for these appellees seek to have the runoff provision of the Georgia Code construed not only "in light" of the proposed, but unadopted, 1964 constitution, which they prevented from being submitted to the voters, *Fortson v. Toombs, supra,* but as if that constitution had been submitted and adopted.[15] That *proposed* constitution called not for a runoff but for a "special election," open to any candidate,[16] in the event no gubernatorial candidate received a majority of the votes.[17] The General Assembly which adopted the Election Code, approved June 24, 1964,[18] was the same General Assembly which, at that same extraordinary session, proposed the 1964 constitution. It certainly knew the difference between a runoff election and a special election,[19] and when

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[13] Justice's brief, pp. 9, 20-24.

[14] There has been no decision by a Georgia Court involving Code § 34-1514 and hence the Attorney General's construction of it is the only existing "state authority."

[15] Justice's brief, pp. 22-23.

[16] See Ga. Code § 34-1515; Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

[17] Ga. Laws, May-June, 1964, Ex. Sess. 234 at 286, Art. 4, § 7, Par. 3; see Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

[18] Ga. Laws, May-June, 1964, Ex. Sess. 26-220.

[19] Compare Ga. Code §§ 34-1514 and 34-1515; Appendix "B" to Appellant's Jurisdictional Statement and Brief on the Merits.

the General Assembly did not provide for a runoff gubernatorial election, it understood what it was doing. *Fortson v. Dorsey*, 379 U. S. 433, 434 n. 1 (1965).

In their reading of the runoff provision, § 34-1514, and in their effort to prevent the casting of write-in votes in a runoff, appellees Justice, *et al.*, have contended that the runoff shall be "between the two candidates receiving the highest number of votes."[20] They have overlooked the sentence in § 34-1514 which follows the one they quoted: "The candidate receiving *a majority of the votes cast* in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner" (Emphasis added). The sentence does *not* read: The candidate receiving a majority of the votes cast for the two candidates. . . . The requirement of a majority applies even to a runoff. Appellees also have overlooked the following provisions of the Georgia Election Code relating to the right to cast a write-in vote:

(1) Ga. Code § 34-1315 (d): "An elector may, at *any* election, vote for *any* person for *any* office, for which office his names does *not appear* upon the voting machine as a candidate, *by a write-in ballot*, containing the name of such person, deposited, written or affixed (but not by the use of a sticker or paster) in or upon the appropriate receptacle or device provided in or on the machine for that purpose, and in no other manner" (Emphasis added).

(2) Ga. Code § 34-1224: "In elections [at polling places where vote recorders are used], a *write-in ballot shall be provided* to permit an elector to vote for persons whose names do not appear on the ballot labels." (Emphasis and matter in brackets added.)

(3) Ga. Code, § 1322 (b): "*Any* ballot indicating a *write-in vote* for *any* person whose name is not

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[20] Justice's brief, p. 25.

printed on the ballot, *shall be counted* as a vote for such person. . . ." (Emphasis added.)

(4) Ga. Code, § 34-1505: "The superintendent, in computing the votes cast at *any* election, shall compute and certify *write-in votes* exactly as such names were written on the ballot, or deposited or affixed in or on receptacles for that purpose, and as they have been so returned by the poll officers." (Emphasis added.)

(5) See also Ga. Code, § 34-1103 (b), (c); § 34-1206 (c), (d), (g); § 34-1220 (c), (d); § 34-1326 (a), (c), (d); § 34-1327; § 34-1328 (c), (e), (f), (g); and § 34-1329.[21]

In driving toward their goal of a runoff election, appellees Justice, *et al.*, have not referred to *Gray v. Sanders, supra.* There the Court said: ". . . once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Ibid.* at 381. In a runoff under Ga. Code, § 34-1514, the class of voters is ". . . the electors entitled to vote in the first . . . election . . ."[22] Can Georgia, in view of *Gray v. Sanders,* deny to anyone entitled to vote in a runoff the right to cast a write-in vote? Appellees seek in Justice to deny to voters the right to

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[21] Copies of the Georgia Election Code, Title 34 of the Georgia Code, Ga. Laws May-June, 1964, Ex. Sess., 26-220, are on file in the Court.

[22] Ga. Code §-1514 provides in pertinent part as follows: "Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34-624." The electors entitled to vote in the "first . . . election" are those who had become registered voters on or before July 25, 1966. Ga. Code § 34-611. Ga. Code § 34-624 prohibits an elector who voted in the primary of one political party preceding a given election from voting in the primary or runoff primary of the other party for the nomination of candidates for that same election. (See Appendix "G", *infra.*)

write-in. They have said that if write-in voting were permitted in a runoff ". . . there would be no way to be sure that the runoff would accomplish its intended result of producing a majority vote for one candidate."[23] Is that not sufficient justification for Georgia's method of gubernatorial election?

If *Gray v. Sanders* applies to every election, it must apply to runoff elections, and: "Every voter's vote is entitled to be counted. . . ." *Ibid.* at 380. If *Gray v. Sanders* does not apply to every election, how can appellees argue that it applies to an election by Georgia's General Assembly?

If *Gray* does not require the counting of write-in votes in a runoff election, the reason for its inapplicability would appear to be that a runoff is a separate stage of an election, to which *Gray* is not applicable. If *Gray* does not apply to the separate runoff stage of an election, then how can it be argued that *Gray* applies to a separate legislative stage of an election?

Assuming momentarily, *arguendo*, that *Gray* permits the discounting of write-in votes in a runoff election, the problem still remains unresolved. It may be that the Georgia Constitution, or Georgia law (see pages 8-9 above) protects the right to cast a write-in vote in a runoff election. *Stewart v. Cartwright*, 156 Ga. 192, 197, 118 S. E. 859 861 (1923); *Adair v. McElreath*, 167 Ga. 294, 315-316, 145 S. E. 841, 850 (1928); *Hooper v. Almond*, 196 Ga. 52, 80, 25 S. E. 2d 778, 793-794 (1943); *Griffin v. Trapp*, 205 Ga. 176, 182, 53 S. E. 2d 92, 95-96 (1949). Thus, even if *Gray* permits the discounting of write-in votes in a runoff, it may nevertheless be necessary to count such write-in votes under the Georgia Constitution and laws, unless the Federal Constitution prohibits Georgia from permitting the casting and counting of write-in votes in a runoff election.

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[23] Justice's brief, p. 25.

Such construction of *Gray* would, we submit, abolish the majority requirement in all elections, and with it, majority rule.

On the other hand it could be contended that *Gray*, in its basic concept, prohibits the plurality system of election, on the ground that where public officials are elected by simple plurality, votes cast against the plurality winner (a majority) are unconstitutionally diluted.

It is therefore respectfully submitted that the runoff election sought by appellees Justice, *et al.*, is not the solution to Georgia's problem of electing a governor.

III. Appellees Morris, *et al.*, Are Not Entitled to a Special Gubernatorial Election.

Appellees Morris, *et al.*, seek a special gubernatorial election open to a candidate of their liking. In support of their contentions they have relied upon numerous newspaper clippings.[24]

These appellees have attempted to show by their news articles that Republicans voted in the Democratic runoff primary held on September 28, 1966.[25] They now are contending that "the apparent Republican cross-over" resulted in two votes for Republicans.[26]

Under Georgia law, party primaries are "open"; i. e., voters are not required to register as Democrats or Republicans, and any registered voter ". . . shall be entitled to vote in any primary or election . . .; provided, however, that an elector voting in the primary or pri-

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[24] Without conceding the accuracy, relevancy of admissibility of those newspaper articles, we expect to show therefrom conclusions different from those drawn by appellees, for such consideration and weight as the Court gives to appellees' news articles.

[25] Morris' brief, p. 3.

[26] Morris' brief, p. 18 and Appendix B, p. 20a.

maries held by a single party for the nomination of candidates to seek public offices to be filled in an election, shall not vote in a primary held by any other party for the nomination of candidates to seek public offices to be filled in the same such election." Ga. Code, § 34-624, Appendix "G", *infra*. See also Ga. Code, §§ 34-103 (g), 34-602, 34-609 (a), 34-612, 34-620, and 34-622.[27]

Georgia not unique in holding "open primaries"; e. g., Alaska, Michigan, Minnesota, Utah, Washington,[28] and Wisconsin.[29] Under Ga. Code, § 34-624, *supra*, a person is not allowed to vote in both the Democratic and Republican primary held to nominate candidates for the same general election, and a person who voted in the Republican primary on September 14, 1966, was prohibited by § 34-624 from voting in the Democratic runoff primary held on September 28.

If appellees Morris, *et al.*, had been dissatisfied with the outcome of the September 28, 1966, Democratic gubernatorial runoff because of some alleged "Republican cross-over" resulting in a "kind of 'one man, two vote rule' for Republicans"[30] it would appear that they should have raised that question after the Democratic runoff in September, rather than awaiting the outcome of the write-in campaign and the General Election of November 8. These appellees belatedly have requested a special election, upon alleged equitable considerations, in effect challenging the "open primary" system,[31] in a case in-

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[27] See n. 21, *supra*.

[28] Regarding the constitutionality of "open primaries", see *Anderson v. Millikin*, 186 Wash. 602, 59 P. 2d 295 (1936).

[29] See The Council of State Governments, THE BOOK OF THE STATES, 1966-1967, Vol. XVI, p. 18; and National Municipal League, COMPILATION OF THE 48 DIRECT PRIMARY SYSTEMS, 3d, 1958.

[30] Morris' brief, p. 18.

[31] See n. 28, *supra*.

volving the sole question of whether or not the General Assembly will be permitted to select a governor.

Appellees Morris, *et al.*, have contended that the declaration by the District Court that Georgia's General Assembly cannot select the governor "voids the General Election",[32] because, they say: "Georgia citizens relied upon the constitutionality of—and cast their ballots under —the Constitution of Georgia."[33] That assertion is not supported by either fact or law.

It is unsupported in fact, because, according to appellees' newspaper clippings, the threat of the instant litigation, and the predictions that the General Assembly would not be permitted to elect the governor if no candidate received a majority, preceded the November General Election like the countdown before the blastoff of a guided missile.[34] For example (Morris brief, Appendix B, pp. 60a-61a):

> WRITE-IN LAWYERS LOOK TO COURT TEST
> (Atl. Journ. 11-4-66).
>
> If no candidate for governor receives a majority of votes Nov. 8, there will be legal action unless a run-off election is held, the Lawyer's Committee of Write-In, Georgia says.
>
> • • • • • • • •
>
> He also pointed out that the current General Assembly is malapportioned and said it would thus not have the authority to elect a governor.
>
> • • • • • • • •

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[32] Morris' brief, p. 15; see also pp. 7-8 thereof.

[33] Morris' brief, p. 15.

[34] See Appendix B to appellee Morris' brief, pp. 43a, 44a, 52a, 53a, 57a, 58a, 60a, 61a, 62a, 63a, 68a, 69a, 73a, 74a, 75a, 76a, and 77a.

> IF NO CANDIDATE receives a majority Nov. 8 "and a run-off is not directed for Nov. 22, the legality of such failure to call a runoff will be challenged. If this challenge is not sustained by the Courts, and the Legislature attempts to pick the governor instead of the people voting, this shall also be challenged," Mr. Jacobs declared.

In an article published in The Atlanta Journal on November 7, the Lawyer's Committee of Write-In, Georgia, again was quoted as saying that the General Assembly could not legally elect a governor. Appellee Morris' brief, Appendix B, p. 73a-75a. Thus, the voters of Georgia went to the polls on November 8 fully aware of the threat, and possible consequences, of the instant litigation. To say that they voted in reliance upon the validity of the constitutional provision here in issue is a mistake of fact.

Moreover, "A Statute which is ultimately declared unconstitutional is presumed to have been known by all to be a nullity from the time of its enactment, even though the fact of its nullity is not known until declared a long time afterward by a five to four decision." *Holland v. Atlantic Stevedoring Co.*, 210 App. Div. (NY) 129, 130, 205 N. Y. S. 397, 398 (1924); *affirmed*, 239 N. Y. 605, 147 N. E. 214 (1925). Thus, to say that the voters went to the polls on November 8 relying on the validity of the Georgia Constitution is also a mistake of law. Moreover, Georgia voters are not unaccustomed to litigation.

Appellees Morris, *et al.*, apparently have contended that they believe there would have been more write-in votes except for the fact that the thesis of the Callaway supporters was that a write-in vote was a vote for Mr. Maddox.[35] Appellees have overlooked their own newspaper articles pointing out the Maddox thesis that a write-in

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[35] Morris' brief, p. 8.

vote was a vote for Mr. Callaway.[36] Eugene Patterson explained that Maddox feared that many long-time Democrats, who would never vote for a Republican, would "write-in", thus substracting from the Democratic votes Mr. Maddox otherwise would receive.[37] [38]

Actually, the write-in movement was discouraged by people not identified with either Mr. Callaway or Mr. Maddox.[39] Retiring Fifth-District Representative Charles L. Weltner "called the 'Write-in Georgia' campaign 'a lost cause'. . ."[40] Congressman Weltner was not alone. For example:

> Alderman G. Everett Millican, who also is a former state senator, said he thought "it would be a great mistake for us to have a write-in campaign." He added: • • •
>
> "If they don't want one of these, they've got the choice of the other, and they ought to take it. Be-

---

[36] Morris' brief, Appendix B, pp. 45a, 46a, 47a, 49a, 50a, 51a, 52a, 69a, 70a, 71a, 72a, 75a, 76a, and 77a.

[37] Morris brief, Appendix B, p. 46a.

[38] Appellees Morris and Robin in the case at bar are the same Morris and Robin in the case of *Morris, et al. v. Fortson,* N. D. Ga., Civil No. 19483, referred to at pages 8-9 of their brief. They are represented by the same attorneys in both suits. Their assertions (Morris' brief, p. 9) that attorneys for Write-In Georgia intend to contest the election through *Morris, et al. v. Fortson, et al.,* N. D. Ga., Civil No. 19483, would necessitate an intervention and an attack by the intervenors upon Art. V, Sec. I, Par. V, of the Georgia Constitution (Ga. Code Ann. § 2-3005), which provides that "Contested elections shall be determined by both houses of the General Assembly in such manner as shall be prescribed by law." In *Baker v. Carr,* 369 U. S. 186, 223, 231-232, 284 (1962), the Court, citing *Taylor v. Beckham* (No. 1), 178 U. S. 548 (1900), indicated that it was not the intent of *Baker v. Carr* to withdraw from state legislatures the power to determine contested gubernatorial elections.

[39] Morris' brief, Appendix B, pp. 28a-34a, 37a-39a, 44a, 45a, 62a, 63a, and 67a-69a.

[40] Morris' brief, Appendix B, p. 58a, article entitled "Write-in a Waste, Weltner Protests."

cause, generally speaking, if you write-in in order to beat one candidate, what you really do is give that candidate a better chance to be elected."

Mr. Millican said also that there was a possibility a write-in campaign could force the decision into the House of Representatives. (Morris' brief, Appendix B, p. 30a, Atlanta Journal, October 7, 1966.)

Other articles pointed out the possibility that the write-in campaign would possibly prevent either Callaway or Maddox from obtaining a majority.[41]

As early as October 10, is was reported as follows:

Some of the supporters of an Arnall write-in believe that even if a million voters turned out in the November election, Arnall could get fewer votes than he did in the primary runoff and still run second in the race, and keep either Maddox or Callaway from getting a majority of the votes. (Morris' brief, Appendix B, p. 33a).

The morning before the election, it was reported that:

Some observers now believe the race between Republican Bo Callaway and Democrat Lester Maddox will be so close that a write-in vote of at least 100,000 for Arnall would be enough to keep anyone from winning with a majority of the votes.

That eventuality opens the doors for all sorts of possibilities.

First, a suit likely would be filed to force a run-off election two weeks later to let the people decide the winner.

• • • • • • • •

Then there is the possibility that if the election is thrown into the legislature, the federal courts will rule that it is too malapportioned to decide the outcome of a governor's race. (Morris' brief, Appendix B, pp. 68a-69a.

[41] Morris' brief, Appendix B, pp. 37a-39a and 67a.

In view of the predictions of the instant litigation, one could almost say that the underlying purpose of the write-in movement was to create a situation whereby Article V, Section I, Paragraph IV, of the Georgia Constitution could be contested, with a view toward seeking a special election open to a candidate acceptable to the write-in group. Having lost the runoff Democratic Primary on September 28, they now seek a special election on the grounds that they were "misled" by the Georgia Constitution.

Appellees Morris, *et al.*, have shown no factual, legal or equitable ground for a special gubernatorial election.

CONCLUSION.

It is respectfully submitted that:

(a) The District Court erred in declaring unconstitutional any part of Article V, Section I, Paragraph IV of the Constitution of Georgia, because *Gray v. Sanders, supra,* is not applicable to it;

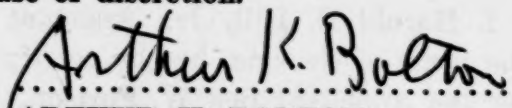
(b) The appellees are attempting to relitigate alleged malapportionment after that matter has been fully and finally adjudicated, *Fortson v. Toombs, supra,* and *Toombs v. Fortson, supra;*

(c) The appellees Justice, *et al.,* seek a runoff gubernatorial election which is not provided for by Georgia law;

(d) The appellees Morris, *et al.,* seek a special gubernatorial election to which they are not entitled;

(e) The District Court abused its discretion and erred in overlooking the mechanics and complexities of Georgia's election laws and by disrupting the election process with precipitate changes, *Reynolds v. Sims,* 377 U. S. 533, 588 (1964); and

(f) The order of the District Court should be reversed as error and as an abuse of discretion.



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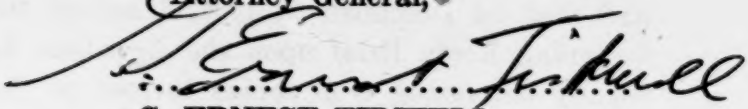

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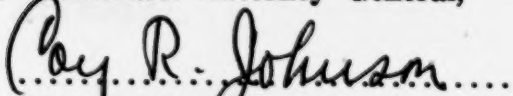

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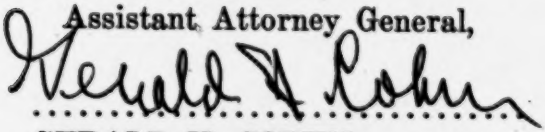

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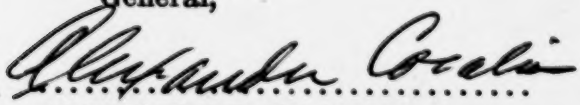

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Proof of Service.

I, Harold N. Hill, Jr., Assistant Attorney General of the State of Georgia, hereby certify that I am of counsel for the Appellant Ben W. Fortson, Jr., that I am a member of the Bar of the Supreme Court of the United States, and that on December 2, 1966, I served the within and foregoing Reply Brief upon the Appellees herein by personally delivering true copies thereof to their Attorneys of Record, Morris Brown and Emmett Bondurant.

Harold N. Hill, Jr.,
Of Counsel for Appellant.

APPENDIX E.

"MINORITY" PRESIDENTS

Under the Electoral College system, 14 Presidents have been elected, either by the Electoral College itself or by the House of Representatives, who did not receive a majority of the popular votes cast in the election. Three of them—John Quincy Adams, Rutherford B. Hayes and Benjamin Harrison—actually trailed their opponents in the popular vote.

The following table shows the percentage of the popular vote received by candidates in the 14 elections in which a "minority" President was elected.

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The following table shows the percentage of the popular vote received by candidates in the 14 elections in which a "minority" President was elected:

Year	Elected	Opponents		
1824	Adams	Jackson	Clay	Crawford
	30.54	43.13	13.24	13.09
1844	Polk	Clay	Birnay	
	49.56	48.13	2.30	
1848	Taylor	Cass	Van Buren	
	47.35	42.52	10.13	
1856	Buchanan	Fremont	Fillmore	Smith
	45.63	33.27	21.08	.01
1860	Lincoln	Douglas	Breckenridge	Ball
	39.79	29.40	18.20	12.60
1876	Hayes	Tilden	Cooper	
	48.04	50.99	.97	
1880	Garfield	Hancock	Weaver	Others
	48.32	48.21	3.35	.12
1884	Cleveland	Blaine	Butler	St. John
	48.53	48.24	1.74	1.49
1888	Harrison	Cleveland	Fisk	Streeter
	47.86	48.66	2.19	1.29
1892	Cleveland	Harrison	Weaver	Others
	46.04	43.01	8.53	2.42
1912	Wilson	T. Roosevelt	Taft	Others
	41.85	27.42	23.15	7.58
1916	Wilson	Hughes	Benson	Others
	49.26	46.12	3.16	1.46
1948	Truman	Dewey	Thurmond	Wallace
	49.51	45.13	2.40	2.38
1960*	Kennedy	Nixon	Unpledged	Others
	49.71	49.55	.92	.27

* 1960 percentages total more than 100 because of double-counted Alabama votes (both under Kennedy and Unpledged columns). See p. 95.

Sources: Library of Congress, Historical Statistics of the U. S., and Congressional Quarterly Records

APPENDIX "F".

Some of the States Which Require That the Election Returns for the Office of Governor Be Transmitted to the Legislature.

State	Constitutional Provision
Alabama	Art. V, Sec. 115
Arkansas	Art. VI, Sec. 3
Colorado	Art. IV, Sec. 3
Delaware	Art. III, Sec. 3
Georgia	Art. V, Sec. 1, Par. III
Illinois	Art. V, Sec. 4
Indiana	Art. V, Secs. 4, 5
Iowa	Art. IV, Secs. 3, 4
Louisiana	Art. V, Sec. 2
Maine	Art. V, Sec. 3
Maryland	Art. II, Secs. 2, 3, 4
New Hampshire	Part II, Art. 42
Ohio	Art. III, Sec. 3
Oklahoma	Art. VI, Sec. 5
Oregon	Art. IV, Secs. 4, 5
Pennsylvania	Art. IV, Sec. 2
South Carolina	Art. IV, Sec. 4
Tennessee	Art. III, Sec. 2
Texas	Art. IV, Sec. 3
Vermont	Chapter 2, Sec. 39
Virginia	Art. V, Sec. 70
Washington	Art. III, Sec. 4
West Virginia	Art. VII, Sec. 3

APPENDIX "G".

Georgia Code Section 34-624.

Right of electors named on list to vote; purging lists; consolidation of lists.—Each elector whose name appears on such list, and who is not found to be disqualified subsequent to the filing of such list, shall be entitled to vote in any primary or election held during the period subsequent to the filing of such list and before the filing of the next such list; provided, however, that an elector, voting in the primary or primaries held by a single party for the nomination of candidates to seek public offices to be filled in an election, shall not vote in a primary held by any other party for the nomination of candidates to seek public offices to be filled in the same such election. It shall be the duty of the registrars to consolidate such list and any such supplemental list for any such primary or election and to make certain that no person is listed more than once. (Ga. Laws May-June 1964 Ex. Sess., 26, 64.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 800

BEN W. FORTSON, JR., Individually, and as Secretary of State of Georgia, *Appellant*,

v.

LARRY G. JUSTICE, MRS. A. P. BEALL, MRS. VIRGINIA BUDD, DR. YANCEY F. CARTER, JR., NOBLE F. COLLINS, GLEA GRAY, BRYAN HURST, DR. BENJAMIN E. MAYS, CARL PORTER, CHARLES SLIGH, DR. HERBERT TYLER, and EVERETT WILLIAMS, *Appellees*.

Appeal from the United States District Court
For the Northern District of Georgia
Atlanta Division

PETITION FOR REHEARING ON BEHALF OF APPELLEES, JUSTICE, et al.

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Appeal from the United States District Court
For the Northern District of Georgia
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PETITION FOR REHEARING ON BEHALF OF APPELLEES, JUSTICE, et al.

The petitioners respectfully petition this Court to grant a rehearing in the above entitled cause, and to set the case for rebriefing and reargument, for the reasons stated below.

This petition is directed solely to the proposition that a Georgia legislature found by the District Court and this Court to be unconstitutionally apportioned

cannot constitutionally elect a Governor.[1] The majority, relying on *Toombs* v. *Fortson*, 384 U.S. 210 (1966),[2] mistakenly equated the act of voting for Governor by legislative representatives in joint session with normal legislative activity which, despite malapportionment, was permitted during a limited period of time to permit the legislature to reapportion itself.[3] *Toombs* v. *Fortson, supra,* a *per curiam* affirmance and the preceding decisions of this Court and the court below in that case, do not remotely support the majority's position but in fact demonstrate its error.

In the arguments over the other questions raised by the several briefs and oral arguments in this case, the following basic and related propositions involved here, but not in *Toombs* v. *Fortson* were overlooked by the majority:

1. An election is an election, whether by the people or by the people's representatives sitting as a committee of the whole.

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[1] The unpublished order of the District Court affirmed by this Court in *Toombs* v. *Fortson*, 384 U.S. 210 (1966), held that the plans of apportionment now operative in the two houses of the Georgia General Assembly "separately and collectively fall short of the mandate of the equal protection clause of the fourteenth amendment as construed by the Supreme Court in *Reynolds* v. *Sims* and related cases." Jurisdictional Statement, pp. 25, 37, *Toombs* v. *Fortson*, 384 U.S. 210 (1966). This conclusion was based on disparities reflected by the 1960 Census. The 1965 population survey by the Georgia Public Health Department shows materially increased disparities. See Appendix A.

[2] A brief summary of the relevant history of *Toombs* v. *Fortson* is set forth in Appendix A.

[3] Normal legislative activity is subject to committee study and debate in the two houses of the legislature, to disapproval by either house, to veto by a popularly elected Governor and, subsequently, to repeal or modification by a properly apportioned legislature. The election of a governor has finality for a four year term.

2. An unfair system of weighting in an election is violative of equal protection, whether in an election by the people or in an election by the people's representatives sitting as a committee of the whole.

3. Unfair weighting is as pernicious in an election by committee where some members represent more than twice as many voters as other members, as in an election by popular vote where some votes are weighted more than twice as heavily as other votes.

4. Unfair weighting, however contrived, cannot be tolerated in an election—and particularly in an election of the chief executive of a state—as a matter of equitable discretion and convenience. *Toombs* v. *Fortson,* relied on by the Court, permits no such result.

In holding that this constitutionally unrepresentative committee of the whole could proceed to elect the Governor of Georgia, the majority relied solely and squarely upon *Toombs* v. *Fortson.* After stating that the election should proceed as provided in Article V of the Georgia Constitution "unless, as some of the parties contend, the entire legislative body is incapable of performing its responsibility of electing a Governor because it is malapportioned," the Court then concluded:

> But this is not correct. In *Toombs* v. *Fortson,* 384 U.S. 210, affirming 241 F. Supp. 65, we held that with certain exceptions, not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor. . . . *Fortson* v. *Morris,* 35 U.S.L. Week..... (U.S. Dec. 12, 1966).

But *Toombs* v. *Fortson* did not even address itself to any such proposition. Rather, the Court merely issued a *per curiam* order affirming the decision of the

District Court relating solely to the capability of the Georgia Legislature to engage in normal *legislative activity* until such time as it was reapportioned in accordance with proper constitutional standards. See Jurisdictional Statement, p. 25, *Toombs* v. *Fortson*, 384 U.S. 210 (1966) (unreported opinion and modified order of the district court). The District Court's opinion described its action as a "discretionary" measure and a "wise and proper course in the interest of plaintiff's State."[4] *Id.* at 35. It noted that "a period of trial and study of the newly apportioned system was indicated so as to provide a more useful instrument of government when the General Assembly was brought within constitutional standards." *Id.* at 26. It is impermissible to suggest that this wise exercise of equitable discretion was intended to lead to the incongruous result that this malapportioned legislature sitting as an unfairly weighted committee of the whole would select a Governor who, during his last two years in office, could perpetuate the evils of malapportionment by vetoing the action of the new, properly apportioned legislature.

The election of the Governor pursuant to Article V of the Georgia Constitution is not legislative action.

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[4] When the District Court considered the attempt of the malapportioned legislature to take action having effect beyond the legislative term not readily subject to correction by a subsequent legislature, namely, the submission of a new Constitution to the people for a vote, the District Court exercised this "wise discretion" to stay the submission. *Fortson* v. *Toombs*, 379 U.S. 621 (1965). This Court did not disapprove the District Court's decision. *Ibid.* The matter of the election of a Governor by the legislature departs even more from normal legislative activity and involves much greater finality than does legislative proposal of constitutional amendments. The election of a Governor would be final for a period of four years, whereas the proposed new constitution could have been rejected by the people at that time or changed by the electorate in concert with a subsequent legislature.

It is simply a casting of votes by representatives of the people in an election and it is conducted by the legislature dissolving into a committee of the whole and casting votes for one of the two candidates involved in the election.

In the light of the foregoing, the majority's reliance on *Toombs* v. *Fortson* to brush over the malapportionment issue is completely erroneous. If *Toombs* v. *Fortson* had never been decided, it seems apparent under the majority's own reasoning that a malapportioned legislature, such as the Georgia legislature concededly is at present, could not elect a governor. The fact that *Toombs* v. *Fortson* has been decided cannot properly change that result, because *Toombs* v. *Fortson* did not address itself to this question, and nothing contained in the action of the District Court or of this Court in that case furnishes any authority whatever for the majority's sweeping declaration that *Toombs* v. *Fortson* somehow authorizes the malapportioned legislature to dissolve into a committee of the whole and elect a Governor.

We cannot believe that the five Justices constituting the majority of the Court intended to approve such a grievous encroachment upon the one man—one vote principle.[5] We suggest the existence of a misunderstanding of the facts and issues in this case and in

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[5] The unfairness of the weighting is grossly aggravated by the fact that 229 members of the committee of the whole, under the rules of the Democratic Party, are pledged to support the democratic nominee. The party rules extend the pledge to the time the election is completed, so long as the nominee of the party is a candidate, and the pledge would by its terms cover both a popular runoff or an election in the legislature. The only way to conclude that the pledge is not significant is to recognize that with the present system of unfair weighting, the election is foreclosed and the pledge is thus not determinative. See Brief of Appellees, Justice, et al., p. 15, *Fortson* v. *Morris*, 35 U.S.L. Week — (U.S. Dec. 12, 1966).

Toombs v. *Fortson* arising from the haste which all parties, including your petitioners, so earnestly sought. But neither the pressure of haste, nor the understandable reluctance to change a decision, nor the inconvenience of a rehearing warrants the denial of the equal protection of the laws to so many Georgia citizens in the election of their Governor who will serve for the four important years ahead.

CONCLUSION

We believe this Court will want to correct its error. Further briefing on the degree and consequence of unfair weighting in the proposed election by the large committee of the whole and on the significance of this Court's decision in *Toombs* v. *Fortson* would be, we submit, most appropriate. For the reasons given, we respectfully ask that this Petition for Rehearing be granted and that the decision of December 12, 1966 be reconsidered at the earliest possible time.

Respectfully submitted,

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Of Counsel

Certificate of Good Faith

I, Randolph W. Thrower, Attorney for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

RANDOLPH W. THROWER

APPENDIX A

History of Toombs vs. Fortson

The majority of this Court has treated the question of whether the Georgia General Assembly is prohibited from selecting the next Governor by reason of the egregious underrepresentation of Georgia's urban areas as having been foreclosed by the Court's prior *per curiam* affirmance of the March 25, 1966 decision of the District Court in *Toombs* v. *Fortson:*

> In *Toombs* v. *Fortson,* 384 U.S. 210, affirming 241 F. Supp. 65, we held that with certain exceptions, not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect a Governor as required by Article V of the State's Constitution. *Fortson* v. *Morris,* 35 *U.S.L. Week* —— (U.S. Dec. 12, 1966).

With all due respect, nothing in the March 25, 1966 decision of the District Court, nor in any of the prior decisions in that case, supports this conclusion.

Indeed, such a construction of the District Court's opinion would be *directly contrary* to its prior decision of November 3, 1964, in which it held that the General Assembly would not be permitted to propose a basic new State Constitution so long as it remained malapportioned and until fair representation in accordance with the equal protection clause could be achieved. See *Fortson* v. *Toombs,* 379 U.S. 621, 622 (1965).

The effort to obtain fair representation in the Georgia General Assembly began in 1962. *Toombs* v. *Fortson,* 205 F. Supp. 248 (N.D. Ga. 1962). Immediately following the decision of this Court in *Reynolds* v. *Sims,* 337 U.S. 533 (1964), the plaintiffs in the *Toombs* case moved to require complete reapportionment of the Georgia House of Representatives prior to the forthcoming two-year general elec-

tions on November 3, 1964. The State made no attempt to defend the constitutionality of the egregious 3-2-1 system under which the House had been apportioned for almost 95 years, and asked only that reapportionment be delayed. While the District Court held the House to be unconstitutionally apportioned, out of deference to the State it refused to require immediate reapportionment in order to afford ample time for the General Assembly to apportion itself at its regular session convening in January 1965. See *Fortson* v. *Toombs,* 379 U.S. 621, 627, 640 (1965) (Appendix A to dissenting opinion of Goldberg, J.).

While the District Court permitted the malapportioned General Assembly to continue to perform ordinary acts of general legislation which "would be readily subject to amendment or repeal by a simple majority of both houses of the properly apportioned General Assembly," Record, p. 167, *Fortson* v. *Toombs,* 379 U.S. 621 (1965), it expressed its concern that the unconstitutionally apportioned Assembly was then convened in Special Session for the purpose of adopting an entirely new State Constitution, which, the court emphasized, would "be the basic law of the state until and unless amended in the future. . . . by a two-thirds vote of the two houses of a properly apportioned General Assembly." *Ibid.* Because it felt that the adoption of such a new State Constitution by the Assembly would have the effect of extending the consequences of malapportionment far beyond the interim period of transition when ordinary legislation would be acted upon, the District Court enjoined the defendants from proposing the constitution. It said:

> [W]hile we feel it appropriate in the exercise of the judicial function to permit the General Assembly to reapportion itself, since the guidelines now established by the Supreme Court are plain and simple, we do not feel that it would be proper to permit such new constitution as may be proposed to be submitted to the people for ratification or rejection when it is,

> as is the case here, proposed under conditions of doubtful legality by a malapportioned legislative body. Record, p. 168, *Fortson* v. *Toombs,* 379 U.S. 621 (1965).

This Court, after the time for ratification had passed, remanded the case to the District Court which, as this Court emphasized, possessed a wide range of equity powers in molding a decree "for reconsideration of the desirability and need for the on-going injunction." *Fortson* v. *Toombs,* 379 U.S. 621, 622 (1965). Certainly there is nothing in the *per curiam* opinion of the majority of this Court indicating any disapproval of the action of the District Court.

The existing apportionment of the Georgia House presents a consistent pattern of county-based overrepresentation of rural areas and underrepresentation of urban areas. Based on the 1960 Census, six of the seven metropolitan counties of the State continue to be underrepresented by more than 15%. The 36 districts in Fulton and DeKalb Counties (Atlanta) have an average population per representative of 22,880. The 59 most overrepresented counties still have 56 seats representing an average population per representative under the 1960 Census of only 14,766. (R. 159-61) Thus, it is clear that the balance of rural power which existed under the 3-2-1 system, under which each county was guaranteed at least one seat, has not in fact shifted. The 110 predominantly rural counties which comprise the 74 most overrepresented districts under the present House apportionment would have possessed 131 House seats under the old 3-2-1 system. Under the revised apportionment passed in 1965, these same 110 counties still possessed an absolute majority of 103 House seats, although they contained only 42% of the population. These disparities had materially increased by 1965. See Brief on Behalf of Appellees, Justice, et al, Appendix B.

Under the 1960 Census, the largest House district still exceeded the smallest by approximately 2 to 1 and an abso-

lute majority of 103 of the 205 House seats could be elected by only 42% of the people. Two-thirds of the districts (143) deviated more than 10% from average; almost one-half (96) deviated more than 15% from average; while one-third of the districts (71) deviated more than 20% from average.

On April 1, 1965, the District Court held the apportionment of both the House and the Senate to be unconstitutional. *Toombs* v. *Fortson*, 241 F. Supp. 65, 73 (N.D. Ga. 1965). The court said:

> The present plan of Senate apportionment in Georgia and the proposed plan of apportionment for the House of Representatives, separately and collectively, fall short of the mandate of the equal protection clause of the Fourteenth Amendment as construed by the Supreme Court in Reynolds v. Sims and related cases, supra. . . . *Toombs* v. *Fortson*, 241 F. Supp. 65, 73 (N.D. Ga. 1965).

While the District Court found the apportionment to be invalid when judged even by the 1960 Census, the 1965 population estimates of the Georgia Department of Health show these disparities to have been far greater. The ratio of greatest disparity between districts had grown from 1.97:1 to 2.61:1. The smaller counties continued to lose population, so that by 1965 each of the two representatives in Decatur County represented only 11,550 people. At the same time the 17 representatives from DeKalb-Rockdale Counties, in the metropolitan area of Atlanta, who represented an average population of 22,280 persons per representative under the 1960 Census represented 30,150 or more under the 1965 population figures. Other underrepresented areas also increased rapidly in population, resulting in more than 40 districts having 1965 populations exceeding 25,000. See Brief on Behalf of Appellees Justice, et al., Appendix B. Yet this Court's recent deci-

sion would approve this kind of unfair weighting in our approaching election for Governor.

In March, 1966, following the decision of this Court in *Swann* v. *Adams,* 383 U.S. 210 (1966), the plaintiffs in the *Toombs* case asked the District Court to modify its order of April 1, 1965 to require reapportionment of the General Assembly prior to the November, 1966 general election. In an unreported opinion of March 25, 1965, the District Court declined to accelerate the pace of reapportionment, other than to require that appropriate legislation be adopted prior to May 1, 1967, rather than May 1, 1968, as its order formerly provided. Jurisdiction was again retained by the District Court, which gave no indication whatsoever that it would not consider the imposition of interim restrictions upon the powers of the General Assembly should subsequent circumstances make such restrictions necessary to prevent any expansion or perpetuation of the consequences of the grossly inadequate and unfair representation in the General Assembly. Jurisdictional Statement, p. 25, *Toombs* v. *Fortson,* 384 U.S. 210 (1966) (unreported opinion and modified order of the district court). This Court, in its *per curiam* order, merely granted the defendants' motion to affirm. *Toombs* v. *Fortson,* 384 U.S. 210 (1966).

Thus, it is clear that neither the former opinions of the District Court nor of this Court in the *Toombs* case, afford any support for the conclusion of the majority that the egregious underrepresentation of Georgia's urban majority in the General Assembly should not and does not disqualify that body, sitting as a committee of the whole, from electing the next Governor of Georgia.

SUPREME COURT OF THE UNITED STATES

No. 800.—October Term, 1966.

Ben W. Fortson, Jr., Individually, and as Secretary of State of Georgia, etc., Appellant, *v.* John Morris et al.	On Appeal From the United States District Court for the Northern District of Georgia.

[December 12, 1966.]

Mr. Justice Black delivered the opinion of the Court.

Since 1824 a provision of the Constitution of the State of Georgia, now Art. V, § I, ¶ IV, has provided that its Governor shall be selected (1) by a majority of votes cast in a general election, and (2) if no candidate receives a majority of votes at such election, then a majority of the members of the Georgia General Assembly shall elect the Governor "from the two persons having the highest number of votes . . . ."[1] At the State's general election, held Tuesday, November 8, 1966, no single candidate received a majority of the votes cast. A Georgia three-judge federal district court has in this case enjoined

[1] Article V, § 1, ¶ IV (Ga. Code Ann. § 2-3004). "How returns published.—The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but, if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

the State Assembly from electing one of the two highest candidates as Governor on the ground that this method of election, required by Article V of the Georgia Constitution, would deny Georgia voters equal protection of the law in violation of the Fourteenth Amendment. We uphold the constitutionality of Article V of the State Constitution, for so long as this provision is applied as it is written, we perceive no conflict with the Equal Protection Clause. We reverse the District Court's judgment.

The District Court erroneously relied on *Gray* v. *Sanders*, 372 U. S. 368, for striking down Article V of the State's Constitution. The *Gray* case held that it had been demonstrated that Georgia voters were denied equal protection of the law by the operation of a county-unit system under which state officials were elected by a majority of counties voting as units instead of by a majority of individual voters. The result was that the number of votes of persons living in large counties was given no more weight in electing state officers than was given to a far fewer number of votes of persons residing in small counties. This discrimination against large county voters was held to deny them the equal protection of the law. This case, as was emphasized, had to do with the equal right of "all who participate in the election," 373 U. S., at 379, to vote and have their votes counted without impairment or dilution. But as the Court said, 373 U. S., at 378, the case was "only a voting case." Not a word in the Court's opinion indicated that it was intended to compel a State to elect its governors or any other state officers or agents through elections of the people rather than through selections by appointment or elections by the State Assembly. It is wrongly cited as having either expressly or impliedly decided that a State cannot, if it wishes, permit its legislative body to elect its Governor.

The language of Article V of the State Constitution struck down by the District Court has been a part of Georgia's State Constitution since 1824 and was readopted by the people in 1945. It set up two ways to select the Governor. The first, and preferred one, was election by a majority of the people; the second, and alternative one, was election by the State Assembly if any one candidate failed to receive a majority of the popular vote. Under the second method, in the legislative election the votes of the people were not to be disregarded but the State Assembly was to consider them as, in effect, nominating votes and to limit itself to choosing between the two persons on whom the people had bestowed the highest number of votes. There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor. A method which would be valid if initially employed is equally valid when employed as an alternative. It would be surprising to conclude that, after a State has already held two primaries and one general election to try to elect by a majority, the United States Constitution compels it to continue to hold elections in a futile effort to obtain a majority for some particular candidate. Statewide elections cost time and money and it is not strange that Georgia's people decided to avoid repeated elections. The method they chose for this purpose was not unique, but well known and frequently utilized before and since the Revolutionary War. Georgia Governors were selected by the State Legislature, not the people, until 1824. At that time a new constitution provided for popular election, but with the provision that upon the failure of any one candidate to receive a majority, the General Assembly should elect.

Two States, Mississippi and Vermont,[2] that provide for majority voting also provide for state legislature election

[2] Miss. Const., Art. 5, §§ 140, 141; Vt. Const., c. II, § 39.

of their governors in case of no majority in the general election. Thirty-eight States of the Union which today provide for election of their governors by a plurality also provide that in case of a tie vote the State Legislatures shall elect.[3]

It thus turns out that Georgia, clearly acting within its rights as a State, has decided that, any one candidate failing to obtain a majority in a general election, its General Assembly will elect its Governor. Its clear choice has remained in its constitution for 142 years. The District Court below treated Article V of the Georgia Constitution as the valid law of the State except as it thought itself compelled to strike it down because of *Gray* v. *Sanders*, *supra*. The *Gray* case, however, did no more than to require the State to eliminate the county-unit machinery from its election system. The State did this in an election that resulted in the election of no candidate. Its duty now, under Article V of its Constitution, is to proceed to have the General Assembly elect its Governor from the two highest candidates in the election, unless, as some of the parties contend, the entire legislative body is incapable of performing its responsibility of electing a Governor because it is malapportioned. But this is not correct. In *Toombs* v. *Fortson*, 384 U. S. 210, affirming 241 F. Supp. 65, we held that with certain exceptions, not here material, the Georgia Assembly could continue to function until May 1, 1968. Consequently the Georgia Assembly is not disqualified to elect

[3] This is by statutory provision in North Carolina and by constitutional provision in Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

a Governor as required by Article V of the State's Constitution. Neither is it disqualified by the fact that its Democratic members had obligated themselves to support the Democratic nominee in the general election on November 8, 1966. That election is over, and with it, terminated any promises by the Democratic legislators to support the Democratic nominee.

Article V of Georgia's Constitution provides a method for selecting the Governor which is as old as the Nation itself. Georgia does not violate the Equal Protection Clause by following this article as it was written.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 800.—October Term, 1966.

Ben W. Fortson, Jr., Individually, and as Secretary of State of Georgia, etc., Appellant, *v.* John Morris et al.	On Appeal From the United States District Court for the Northern District of Georgia.

[December 12, 1966.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan, and Mr. Justice Fortas concur, dissenting.

This is an appeal from a decision of a three-judge district court declaring unconstitutional and enjoining the enforcement of Article V, Section 1, Paragraph 4 of the Georgia Constitution which authorizes the election of the Governor of Georgia by the General Assembly when no candidate has received a majority of the total votes cast in the general election.[1]

We are told that in the November 8, 1966, general election for Governor, there were 955,770 votes cast as follows:

Howard H. Callaway	449,894 Votes or	47.07%
Lester G. Maddox	448,044 Votes or	46.88%
Ellis G. Arnall	57,832 Votes or	6.05%

The Georgia Election Code provides that "no candidate shall be nominated for public office in any primary or

[1] Georgia Constitution, Art. V, § 1, ¶ 4 provides:

"The members of each branch of the General Assembly shall convene in the Representative Hall, and the President of the Senate and Speaker of the House of Representatives shall open and publish the returns in the presence and under the direction of the General Assembly; and the person having the majority of the whole number of votes, shall be declared duly elected Governor of this State; but,

elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office." Ga. Code Ann. § 34–1514 (Supp. 1965). That law goes on to provide that where no candidate "receives a majority of the votes cast, a runoff primary or election shall be held between the two candidates receiving the highest number of votes," and the candidate who receives "a majority of the votes cast in such runoff" shall be declared the winner. The Attorney General of Georgia rendered an opinion on October 21, 1966, that the provisions of § 34–1514 were in conflict with the provisions of the Georgia Constitution and that the latter controlled in the event no candidate for Governor received a majority in the general election.

This action for a declaratory judgment was brought by citizens of Georgia residing in counties throughout the State who voted in the November 8, 1966, general election for Governor. They ask for the benefit of a runoff election between the two candidates who received the highest number of votes as provided in § 34–1514 or a special election pursuant to the Georgia Election Code.[2] The District Court held the provision of the Georgia Constitution which placed the election of the Governor in the General Assembly unconstitutional and void.

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if no person shall have such majority, then from the two persons having the highest number of votes, who shall be in life, and shall not decline an election at the time appointed for the General Assembly to elect, the General Assembly shall immediately, elect a Governor viva voce; and in all cases of election of a Governor by the General Assembly, a majority of the members present shall be necessary to a choice."

[2] Ga. Code Ann. § 34–1515 (Supp. 1965) provides:

"Whenever any primary or election shall fail to fill a particular nomination or office and such failure cannot be cured by a runoff primary or election . . . then the authority, with whom the candidates for such nomination or office filed their notice of candidacy, shall thereupon call a special primary or election to fill such position."

— F. Supp. —. It issued a stay for a period of 10 days so as to enable the appellant to seek an additional stay here and retained jurisdiction for such other and further proceedings as might be deemed applicable and just. The case is here by appeal which we noted and we expedited the hearing because of the urgency of the issue presented. 385 U. S. —.

The Court misstates the question we must decide. It is not whether Georgia may select a Governor through a legislative election.[3] It is whether the legislature may make the final choice when the election has been entrusted to the people and no candidate has received a majority of the votes. In other words, the legislative choice is only a part of the popular election machinery. The 1824 amendment to the 1798 Constitution of Georgia, which gave the legislature power to elect a governor, treated that stage as only one of two in the general election.[4] The first stage, then as now, was an election open to "the persons qualified to vote for members of the general assembly." Ga. Const., 1798, Art. II, § 2, as amended, 1824.

It is said that the general election is over and that a new, and different, alternative procedure is now about to be used. But that is belied by the realities. The primary election selected the party condidates, the choices of the two parties are still in balance, and the legislative choice is restricted to those two candidates. The election, commencing with the primary, will indeed not be finally completed until the winner has taken the oath of office. Up to then the vacancy which occasioned the election has not been filled.

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[3] Georgia's state auditor is chosen by the legislature. 40 Ga. Code Ann. § 1801 (Supp. 1965).

[4] Originally Georgia left the selection of Governor to the legislature, the House selecting three candidates and the Senate choosing one of the three by majority vote. Ga. Const., 1789, Art. II, § 2.

Our starting point is what we said in *Gray* v. *Sanders*, 372 U. S. 368, 379–380:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."

It is argued with earnestness that if the electoral college can be used to select a President, a legislature can be used to select a governor. It is said that there is no more a violation of the "one person, one vote" principle in the one than in the other. But the Twelfth Amendment creates the exception in case of a President. There is no like exception in the choice of a governor.[5]

> "The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President . . . . But once the class of voters is chosen and their qualifications specified,

[5] "We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election. No such specific accomodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued." *Gray* v. *Sanders*, 372 U. S. 368, 378.

we see no constitutional way by which equality of voting power may be evaded.

"The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders, supra,* at 380–381.

If the legislature is used to determine the outcome of a general election, the votes cast in that election would be weighted, contrary to the principle of "one person, one vote." All the vices we found inherent in the county unit system in *Gray* v. *Sanders* are inherent when the choice is left to the legislature. A legislator when voting for governor has only a single vote. Even if he followed the majority vote of his constituency, he would necessarily disregard the votes of those who voted for the other candidate, whether their votes almost carried the day or were way in the minority.[6] He would not be under a mandate to follow the majority or plurality votes in his constituency, but might cast his single vote on the side of the minority in his district. Even if he voted for the candidate receiving a plurality of votes cast in his district and even if each Senator and Representative followed the same course, a candidate who received a minority of the popular vote might receive a clear majority of the votes cast in the legislature. As stated by the District Court:

"The Georgia election system in the constitutional provision now under consideration permits unequal

[6] In *Gray* v. *Sanders, supra,* in speaking of this same vice in the county unit system we said:

". . . if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded." 372 U. S., at 381, note 12.

treatment of the voters within the class of voters selected, and it thus cannot stand. Many arguments may be made, but we need go no further than to point out, as stated, that the candidate receiving the lesser number of votes may be elected by the General Assembly. This would give greater weight to the votes of those citizens who voted for this candicate and necessarily dilute the votes of those citizens who cast their ballots for the candidate receiving the greater number of votes. The will of the greater number may be ignored." — F. Supp. —.

I have said enough to indicate why the substitution of the Georgia Legislature for a runoff vote is an unconstitutional weighting of votes, having all the vices of the county unit system that we invalidated in *Gray* v. *Sanders*.

What is approved today can, moreover, be the instrument to perpetuate a "one party" system in like derogation of the principle of "one person, one vote." The pledge that every Democratic member of the Georgia Legislature took provides in part: "I further pledge myself to support at the General Election of November 8, 1966, all candidates nominated by the Democratic Party of the State of Georgia." That election has not been completed. We are, as I have said, in the second stage of it. The Democrats control 183 seats [*] in a 205-member House and 46 seats in a 54-member Senate. We would be less than naive to believe that the momentum of that oath has now been dissipated and that the predominantly Democratic legislature has now become neutral.

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[*] This figure does not take into account a runoff election held on November 22, 1966, to fill a House seat.

The fact that this constitutional provision allowing the legislature to choose the Governor was adopted by the people of Georgia is "without federal constitutional significance, if the scheme adopted fails to satisfy the basic requirements of the Equal Protection Clause, as delineated in our opinion in *Reynolds* v. *Sims*." See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 737. We dealt there with an apportionment plan that had been adopted by a popular referendum. We repeat what we said: "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Id.*, 736–737.

I would affirm the judgment of the three-judge court and remand the cause for the fashioning of an appropriate decree for a runoff election in which the people's choice will be determined.

SUPREME COURT OF THE UNITED STATES

No. 800.—October Term, 1966.

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[December 12, 1966.]

Mr. Justice Fortas, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

I join the opinion of my Brother Douglas, but I add the following:

The specific question before us is the validity of the Georgia constitutional provision which, after vesting in the people "full and complete power to elect a Governor," [1] provides that if no candidate receives a majority, the legislature shall select the winner from the two receiving the highest popular vote. The legislature may select the candidate who received fewer popular votes than his rival. In my opinion, this scheme is forbidden by the Equal Protection Clause of the Fourteenth Amendment as construed by this Court.

1. *Gray* v. *Sanders*, 372 U. S. 368 (1963), related to Georgia primary elections to nominate candidates for statewide office, including Governor. It held that where the vote cast by each citizen does not have full and equal effect as a result of operation of the county unit system, the Equal Protection Clause is violated. If the Constitution of Georgia incorporated the county unit system as part of the mechanics for election of Governor,

[1] *Thompson* v. *Talmadge*, 201 Ga. 867, 880, 41 S. E. 883, 895 (1947). *Thompson* invalidated selection of a Governor by the legislature when the candidate who received a majority of the votes cast died before taking office.

I assume there would be no doubt that *Gray* v. *Sanders* would invalidate the provision. Unless the Court is overruling *Gray* v. *Sanders*, it presumably would not validate a Georgia constitutional provision which said that if a majority of the votes are not cast for one candidate, they will be recomputed on a county unit basis which is not proportionate to the voting population, and the result of that recomputation would determine the winner. It is no less a denial of equal protection of the laws for the result of an election to be determined not by the voters, but by the legislature on a basis which is not related to the votes cast. No less than the county unit system, this means that the vote cast by a citizen is subject to nullification by the legislature. The integrity of the vote is undermined and destroyed by any scheme which can result in the selection of a person as Governor who receives the lesser number of popular votes. If the voting right is to mean anything, it certainly must be protected against the possibility that victory will go to the loser.

2. It distorts reality to say, as the majority here do, that this election is to be scrubbed and ignored, and to proceed as if we were dealing with a situation in which Georgia's Constitution merely provided for the selection of a Governor by the legislature. That is *not* the case. If it were the intent of the Constitution to scrub the popular election and to cause selection by the legislature as an independent process, the legislature would not be bound to select from the two who received at the polls the highest number of votes. The legislature would be given free choice. As my Brother DOUGLAS' opinion shows, the Constitution attempts something quite different. It purports to give the legislature power to complete the process begun at the polls—to cast aside the vote of the electorate and award the office to the winner or the loser of the popular election, as it may see fit. The

analogy to *Gray* v. *Sanders* is clear. This is just as if, for example, the voters expressed their preferences at the polls, and then the winner was selected not on the basis of receiving most votes, but on the basis of selection of the winner by officials of the counties concerned.[2]

3. The Georgia legislature is concededly malapportioned, and is under a federal court order to reapportion itself. *Toombs* v. *Fortson*, 384 U. S. 210 (1966), affirming 241 F. Supp. 65 (D. C. N. D. Ga. 1965). See also *Fortson* v. *Toombs*, 379 U. S. 621 (1965). A majority of the legislators in Georgia's legislature may represent a minority of the voters. But the Court today concludes that despite the fact that it has branded the legislature as apportioned in violation of the Constitution of the United States, it may nevertheless select the Governor. The Court states as its reason for disregarding this that "In *Toombs* v. *Fortson* . . . we held that with certain exceptions, not here material, the Georgia Legislature could continue to function until May 1, 1968." This is indeed a weak reed for so monumental a conclusion. The use of a malapportioned legislature to select a Governor is to perpetuate the electoral vices which this Court decreed that the Equal Protection Clause of the Fourteenth Amendment forbade a State to incorporate in its election procedures. *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Gray* v. *Sanders*, *supra*. We have declined to deprive a malapportioned legislature of its *de facto* status as a legislature. But not until today has this Court allowed a malapportioned legislature to be the device for doing indirectly what a State may not do directly. If this

[2] This would resemble the presidential electoral college system. *Gray* v. *Sanders* expressly states that while this system is beyond judicial reach because it is specifically incorporated in the Federal Constitution, it does not indicate the constitutionality of analogous state schemes. 372 U. S., at 378. See also *Reynolds* v. *Sims*, 377 U. S. 533, 572–577 (1964).

Court has foreseen that events would place the Georgia legislature in a position to override the vote of a plurality of the voters and to select as Governor of the State the loser at the polls, I expect that it would have included this power as one of the "exceptions," forbidden to this legislature which, this Court has held, functions only by judicial sufferance despite its constitutional infirmity. To a reader of *Gray* v. *Sanders*, *Fortson* v. *Toombs*, and *Toombs* v. *Fortson*, it must seem inconceivable that the Court would permit this malapportioned legislature to select Georgia's Governor in these circumstances. Indeed, the irony of the matter is that a three-judge federal court held that the Georgia legislature was so malapportioned that it could not properly submit to the voters a new Constitution, adopted by both houses of the Georgia legislature, which would have abolished the provisions for legislative selection of a Governor and have substituted a runoff or special election. See *Fortson* v. *Toombs*, *supra*. On appeal, this Court *per curiam*, declined to rule that the District Court's decree was unlawful, but because it was represented that the decree might be moot, the Court remanded for reconsideration in light of the circumstances which allegedly made the decree no longer pertinent. *Fortson*, *supra*. But now the Court holds that this same, unreformed legislature is not so malapportioned that it cannot itself select the Governor by its direct action!—I confess total inability to understand how the two rulings can be reconciled.

4. In denying the applicability of *Gray* v. *Sanders*, the Court says that it was "only a voting case" and that it has nothing to do with a State's decision that the voters will be ousted from their functions, the votes cast by them nullified, and the legislature authorized to select the candidate that most of the electorate repudiated. I respectfully submit that this, too, is "a voting case." It

is no less a voting case because it deals with a state mechanism for *total* disregard of the principle of one man-one vote. It is no less a voting case because it deals with the election of the Governor rather than his nomination as in *Gray* v. *Sanders*. I should assume—diffidently in view of today's startling result—that this Court would not rule that the Federal Constitution would tolerate a state constitutional provision that would enable the Governor to appoint the legislature—or to appoint any legislators for election districts if no candidate received a majority of the votes—or two-thirds—or three-fourths. But there is no difference in principle between this and the result sanctioned today. If a State can validly provide that the result at the polls can be disregarded and the outcome removed from democratic processes where no candidate for Governor receives a majority, there is no reason why the same rule cannot be applied to legislators. Moreover, the Court today announces in an off-hand manner, as a side-effect of today's decision, without adequate argument or consideration, that a State may today, as some States did long ago, provide that its Governor shall be selected by its legislature in total disregard of the voters. I do not believe that the issue is so easy. Much water has gone under the bridge since the late 1700's and the early 1800's. Our understanding and conception of the rights guaranteed to the people by the "stately admonitions" [3] of the Fourteenth Amendment have deepened, and have resulted in a series of decisions,[4] enriching the quality of our democracy, which certainly do not codify State's rights, governmental theories or conceptions of human liberties as they existed in 1824, the date

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[3] Learned Hand, Spirit of Liberty 163 (1960).

[4] See, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962); *Gray* v. *Sanders*, *supra*; *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, 377 U. S. 533 (1964); *Harper* v. *Virginia State Bd. of Elections*, 383 U. S. 663 (1966).

when Georgia adopted its present system of choosing a Governor. I have no doubt, for example, that in the early days of the Nation many of the state legislatures were malapportioned. See *Reynolds* v. *Sims*, *supra*, at 573, n. 53, 602–607. But this did not enshrine that condition forever beyond the reach of constitutional prohibition. Certainly, the antiquity of the practice did not cause this Court to refrain from invalidating malapportionment under the Equal Protection Clause. As Mr. Justice Holmes said long ago,

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Missouri* v. *Holland*, 252 U. S. 416, 433 (1920).[5]

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[5] Only last Term, the Court held in *Harper* v. *Virginia Bd. of Elections*, 383 U. S. 663 (1966), that the right to vote in state elections cannot be burdened or conditioned by a poll tax. We observed:

"We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statics' (*Lochner* v. *New York*, 198 U. S. 45, 75). Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy* v. *Hogan*, 378 U. S. 1, 5–6. Notions of what constitutes equal treat-

I do not believe that this Court is the sole custodian of the Constitution, or of the democratic liberties of the people. The power and the responsibility rest also with the States, the people, and with lower courts, including the courageous District Court that in the present case insisted upon following this Court's decision in *Gray* v. *Sanders*. But if the people of Georgia—or Maine or California or New York, for that matter—should adopt a constitutional amendment to provide for election of their Governor by the legislature—or for selection of the upper house of their legislature by their Governor, for example—I do not believe that the constitutionality of these measures could be cavalierly assumed. Perhaps this Court's voting rights cases could not so easily be nullified. Their meaning and thrust are perhaps deeper than the mechanics of the tally. They are, one may hope, not merely much ado about form. They represent, one has been led to believe, an acknowledgment

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ment for purposes of the Equal Protection Clause *do* change." 383 U. S., at 669.

See also the classic statement by Mr. Justice Brandeis, in his dissent in *Olmstead* v. *United States*, 277 U. S. 438, 472 (1928):

"'We must never forget,' said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 'that it is a constitution we are expounding.' Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. . . . We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387; *Buck* v. *Bell*, 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."

See also *Weems* v. *United States*, 217 U. S. 349, 373 (1910).

that the Republican form of government guaranteed by the Constitution, read in light of the General Welfare Clause, the guaranties of equal protection of the laws and the privileges and immunities of citizens of the United States, requires something more than an adherence to form. This Court's apportionment and voting rights decisions soundly reflect a deepening conception, in keeping with the development of our social, ethical, and religious understanding, of the meaning of our great constitutional guaranties. As such, they have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional ideal. Today's decision is a startling reversal; a belittling, I say with all respect, of our Constitution's dynamic provisions with respect to the basic instrument of democracy—the vote.

6. The Court brushes off *Gray* v. *Sanders* by saying that it has to do only with the "equal right of all voters to vote and have their votes counted without impairment or dilution." That is so. But that is precisely the issue in the present case. We have not heretofore been so beguiled by changes in the scenery that we have lost sight of principle. See *Terry* v. *Adams*, 345 U. S. 461, esp. 465, n. 1 (1953); *Smith* v. *Allwright*, 321 U. S. 649, 661 (1944). See also *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964). Here, too, we are dealing at least with the "impairment" of the vote—indeed, with the obliteration of its effect. It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function—the office—the effect given to the vote, that is protected.

A vote is not an object of art. It is the sacred and most important instrument of democracy and of freedom. In simple terms, the vote is meaningless—it no longer serves the purpose of the democratic society—unless it, taken in the aggregate with the votes of other citizens,

results in effecting the will of those citizens provided that they are more numerous than those of differing views. That is the meaning and effect of the great constitutional decisions of this Court.

In short, we must be vigilant to see that our Constitution protects not just the right to cast a vote, but the right to have a vote fully serve its purpose. If the vote cast by all of those who favor a particular candidate exceeds the number cast in favor of a rival, the result is constitutionally protected as a matter of equal protection of the laws from nullification except by the voters themselves. The candidate receiving more votes than any other must receive the office unless he is disqualified on some constitutionally permissible basis or unless, in a runoff or some other type of election, the *people* properly and regularly, by their votes, decide differently. "The right to vote is too important in our free society to be stripped of judicial protection" [6] by any other interpretation of our Constitution.

In essence, *Gray* v. *Sanders* held that the Equal Protection Clause is violated when persons are elected to statewide office on a basis other than their receiving more votes than their rivals. In my opinion, this principle is exactly applicable here.

It is with the greatest regret that I conclude that today's decision reflects a retreat from constitutional principles so soundly and so proudly developed to apply the Constitution's magnificent admonitions to the deepening moral and human principles of our time. I would affirm the District Court.

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[6] *Wesberry* v. *Sanders*, *supra*, at 7.